

**Strike or Strike Out:
An Analysis of Australian Compliance with International
Standards on the Right to Strike**

By

Shae McCrystal BA LLB (Hons)

**Submitted in fulfilment of the requirements for the Degree of Doctor of
Philosophy, University of Tasmania (November 2004).**

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To the memory of Elma Louise

Abstract

Australia, as a signatory to United Nations and International Labour Organisation Conventions on the Principle of Freedom of Association, is obligated in international law to implement a right to strike. The express and implicit right to strike within these instruments operates as a functional aspect of the principle of freedom of association and is an integral component of the normative ILO model of voluntary collective bargaining.

The thesis examines the voluntarily assumed international obligations binding Australia with respect to the right to strike, identifying the exact nature of the obligation undertaken in international law, and measures the degree to which the federal regulatory model complies. Particular attention is paid to the model of protected action within the *Workplace Relations Act 1996* (Cth) (WRA).

The measurement of the compliance by the federal legal framework is undertaken through examination of the legal framework of voluntary collective bargaining and its practical impact. The discussion measures compliance on the basis of the specific standards enunciated by international agencies, and on the basis of the appropriate role of strike action in a normative model of voluntary collective bargaining based on the principle of freedom of association.

The thesis concludes that the federal model of voluntary collective bargaining instituted under the WRA fails to comply with international standards on the right to strike from a global perspective, but achieves a degree of compliance on the specific level of the WRA protected action regime. There is no right to strike in Australian law for a wide variety of strike action that is encompassed by the principle of freedom of association in international standards. Where a right to strike is provided in the context of protected action, the right is compliant in form but not in substance.

The failure of the model to comply in substance stems from the differing approaches taken in international and Australian law to the principle of freedom of association

and the role of strike action within voluntary collective bargaining. International standards encompass strike action as an aspect of a functional freedom of association designed to operate as a tool of bargaining. Non compliance in Australia stems from an approach to strike action that separates strike and freedom of association, using strike to facilitate predetermined bargaining outcomes rather than accommodating choice in bargaining processes.

Preface

The thesis is current to Thursday October 28 2004. The re-election of the Howard Coalition Government on Saturday 9 October 2004, suggests that the law outlined will remain largely unchanged for the next three years.

The strong likelihood that the Coalition will control the Australian Senate when the election results are finalised suggests that the changes proposed to the *Workplace Relations Act* 1996 (Cth), and canvassed in the thesis, will be passed into law in the proposed or a modified form.

I would like to acknowledge and thank my supervisors, Professor Margaret Otlowski and Professor Phillipa Weeks who have been a source of tremendous inspiration and support throughout the writing of this thesis. Without the involvement of either one of these two brilliant women this thesis would never have been completed.

I would also like to acknowledge Professor Richard Mitchell, who has been as dear to me as ever a supervisor could be. Thankyou Richard for your time, the space to work, your unfailing encouragement and all the cigarettes!

In addition, I must thank my family and friends for their support, encouragement and tolerance, especially my parents, Raylene and Eric, and the ever changing crew at Edgar's and Ebden St, (including Ruby and Kali). Further, thanks to John and Penny at the Beaconsfield Wholefood Shop, and Brenna and Gerry at Satis, for giving me the space to work, and appreciating the addition of a 'literary' atmosphere.

Finally, I would like to acknowledge and thank Matthew, who has brought me great happiness (and timely proof reading skills!).

List of Acronyms

Australian Workplace Agreement: AWA.

Committee of Experts on the Application of Conventions and Recommendations:
CEACR.

Committee on Freedom of Association: CFA.

Committee on the Application of Standards of the International Labour Conference:
Conference Committee.

Industrial Relations Act 1988 (Cth): IR Act.

Industrial Relations Reform Act 1993 (Cth): Reform Act.

International Covenant on Economic, Social and Cultural Rights: ICESCR.

International Covenant on Civil and Political Rights: ICCPR.

International Labour Organization: ILO.

United Nations: UN.

Universal Declaration of Human Rights: UDHR.

United Nations Committee on Economic, Social and Cultural Rights: CESCR.

United Nations Economic and Social Council: ECOSOC.

United Nations Human Rights Committee: UNHRC.

Workplace Relations and Other Legislation Amendment Act 1996 (Cth): WROLAA.

Workplace Relations Act 1996 (Cth): WRA.

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Conclusion

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Introduction

The phenomenon of the strike is one of the crucial problems of contemporary industrial relations because it lies at the very core of the legal regulation of industrial conflict. The strike is basic to the distribution of power between capital and labour, and also forms part of the problem of the autonomy of groups and their relationship to the State. The concept of the strike relates to issues which lie at the heart of the ideological conflicts of industrial relations. It gives rise to practical as well as to theoretical questions. Social and economic crises in virtually every part of the world, changes in the composition of the workforce, the integration of increasingly complex technologies, the expanding legal regulation of labour relations, changing attitudes towards trade unionism, and changes in the social significance of concerted action, collectively challenge the scope and extent of strikes.¹

Strike action is controversial.² Unlike employment disputes between individual employers and employees, broader industrial disputes involving strike action intersect with a variety of competing interests and ideologies. Employers stand to lose business and profit. Employees stand to lose wages and employment. The public faces interruption to the supply of relevant goods or services. Governments face the consequences of economic and public disruption and the possible impact at the ballot box. Collective action by workers - forming groups, pooling their resources and withdrawing their labour - triggers ideological debates concerning collective power, individualism, freedom of association and the exercise of private power in public markets. In short, strike action is a microcosm of the tensions inherent in the broader labour relations context.

¹ R. Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer Law and Taxation Publishers: Deventer, 1988) at 1.

² Within this thesis the use of the phrase "strike action" encompasses all forms of concerted action undertaken in order to effect an industrial outcome, including total work stoppage and forms of action less than total work stoppage: for example go slow, work bans or work to rule. The word "strike" in Australian law has generally been used to refer to a total work stoppage. For example, Sykes in his pre-eminent study of Australian strike law uses the word "strike" to refer to a complete withdrawal of labour and the phrases "industrial pressure" or "industrial tactics" to refer to other forms of concerted action. Sykes also provides an excellent discussion of the history of the definition of "strike" in Australian law: E. I. Sykes, *Strike Law in Australia* (2nd ed., Law Book Company: Sydney, 1982) at part II, chapter 6. This approach is also demonstrated in W. B. Creighton, W. Ford and R. Mitchell, *Labour Law: Materials and Commentary* (2nd ed., Law Book Company: Sydney, 1993) at 1133, paras 32.3-32.9. However, despite the historical use of the word "strike" in the Australian context, this thesis adopts the approach used in international law, particularly in the ILO, whereby the word "strike" encompasses the broader range of conduct identified above: see B. Creighton and A. Stewart, *Labour Law: An Introduction* (3rd ed., Federation Press: Sydney, 2000) at 379, para 13.03. The international approach has been adopted due to the complexities of definition within the Australian system (common law and statute), the relative simplicity of the international approach and for consistency throughout the thesis.

In Australia, the competition of interests and ideologies around collective action has generated a heavily regulated system of collective labour relations. There is a significant body of law providing prescription and prohibition over the negotiation and settlement of pay and conditions of employment, and strike action is a focal point of this legal regulation. The ability to take strike action, the reasons for and content of such action and the form that the action may take, are all subjected to detailed domestic legal regulation. In addition to the domestic framework, labour relations, and strike in particular, are the subject of international law, whereby a body of international labour standards has developed over the recognition and protection of the right to strike as a human right. The complexity of the array of competing interests and ideologies affected by strike action has prompted the development of equally complex domestic and international legal frameworks.

The thesis is a case study of the regulation of strike action from international and domestic perspectives, encompassing the legal framework governing strike action, the practical operation of those mechanisms and the role that strikes play within the broader regulation of employment relations. This involves examining both international and domestic law on the right to strike and measuring compliance by domestic law with international legal obligations. These steps will provide the basis upon which to draw conclusions concerning the right to strike within the domestic and international contexts, the role of the right to strike within collective bargaining and the fundamental elements that make up a voluntary collective bargaining model.

Background

In measuring the extent to which Australian law complies with voluntarily assumed international obligations concerning the right to strike, the study examines the legal framework of strike law in the Australian and international context. In order to appreciate the modern legal framework, it is important to place the law within the historical context of both the national and international regimes.

The Regulation of Strikes in Australian law

Strike action has been a central theme of Australian labour law from the earliest days of the passage of colonial legislation providing for conciliation and arbitration,³ through the negotiation and enactment of the Australian Constitution⁴ and the first Commonwealth *Conciliation and Arbitration Act* in 1904 that aimed to replace the “rude and barbarous processes of strike and lockout” with industrial peace.⁵

The conciliation and arbitration model that prevailed in Australia for the better part of a century was based on the premise that if parties to industrial conflict were provided with an alternative compulsory forum for the resolution of disputes, there would be no need to resort to industrial action.⁶ All disputes could be resolved through the decision of an independent and impartial arbitrator, a role played by the Conciliation and

³ Discussion of the passage of colonial legislation prior to Federation can be found in: S. Macintyre and R. Mitchell, (eds.) *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890 – 1914* (Oxford University Press: Melbourne, 1989), in particular chapter 4, R. Mitchell, ‘State Systems of Conciliation and Arbitration: The Legal Origins of the Australasian Model’ at 74 -103.

⁴ The debates of the Australian Constitutional Conventions in the 1890s are peppered with comments by delegates to the Conventions concerned with the prevalence of strike action within the colonies and the need to ensure the ability of the new Australian State to have adequate mechanisms to deal with strike action. For example, Charles Cameron Kingston, an ardent supporter of compulsory conciliation and arbitration remarked: “What have we chiefly to deplore at the present day in connexion with our various industries? The prevalence of strikes and lock-outs – barbarous modes of settling differences, which should, if possible, be adjusted amicably” (*Official Record of the Debates of the Australasian Federal Convention*, (3rd Session), 20th January 1898 to 17th March 1898, Melbourne at 185).

⁵ H. B. Higgins, *A New Province for Law and Order* (Workers Educational Association of New South Wales: Sydney, 1922) at 2. During the second reading speech of the Commonwealth *Conciliation and Arbitration Bill*, Prime Minister Deakin stated: “The central purposes of this Bill is to prevent strikes and lock-outs These are the modes of war which render our industrial system to pieces” (House of Representatives, *Parliamentary Debates*, 22 March 1904, 765).

⁶ The motivation to replace strikes with compulsory conciliation and arbitration is demonstrated through the commentary reproduced in footnotes 4 and 5 above. In addition, contemporary commentaries referred to the Australian and New Zealand models of compulsory conciliation and arbitration as “great social experiments” or “political laboratories”. For example: ‘Australia: Strikes and Legislation’ *Round Table*, December 1912, 152 – 162; H. D. Lloyd, *A Country Without Strikes: A Visit to the Compulsory Arbitration Court of New Zealand* (Doubleday, Page and Co: New York, 1900), particularly note the introduction by W.P. Reeves at vii. However, it is also important to note that there were a range of other factors at play in the introduction of compulsory conciliation and arbitration that were not related to the prevalence of strike action. For example, Bennett points to the economic depression of the 1890s that exacerbated the power imbalance between employers and employees and undermined the potency of collective action: L. Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and the Law*, (Law Book Company: Sydney, 1994) at 11. Macintyre demonstrates the effect of the depression and the 1890s maritime disputes on the Australian labour movement, and argues that as a result of resounding defeats in the 1890s in the field of industrial warfare, the labour movement became “conscious of its growing strength as a political force to influence legislation and judicial appointments”: S. Macintyre, ‘Neither Capital, nor Labour: The Politics of the Establishment of Arbitration’ in S. Macintyre and R. Mitchell, (eds.) *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890 – 1914* (Oxford University Press: Melbourne, 1989), 178 at 198.

Arbitration Court (later Commission, and later still, the Australian Industrial Relations Commission). However, the flawed nature of this premise was evident from the earliest days of the operation of the system.⁷ It was soon accepted that the system did not operate in practice to prevent strikes; rather it influenced strike behaviour so that Australia consistently maintained a high incidence of strikes, but the duration of strikes was shortened.⁸ Therefore, conciliation and arbitration produced a system with short sharp strikes rather than long drawn out action.⁹

Strikes were uneasily accommodated within the arbitration model, leading to two well recognised oddities. First, the conciliation and arbitration system did not resemble either free market collective bargaining or conciliation and arbitration (which would prohibit strikes). The model was hybrid in nature, drawing upon elements of bargaining and of compulsory arbitration. Sykes and Glasbeek observed:

The notion was simple enough. Employers could try to set the terms of employment by individual bargaining or, if the employees had managed to create a cohesive group or trade union, by collective bargaining. But in either case, if a deadlock ensued, then the disputants had to submit to an external settlement of their quarrels. Thus, the scheme theoretically endorsed regulation of industrial conditions by a commercial free-for-all limited by the law of private contract and by the newly evolved legal and economic concepts associated with collective action, and finally, by the forceful imposition of a solution agreed to by neither party to the dispute. Once it is stated in this fashion one wonders how the originators of the system could ever have believed that it would succeed.¹⁰

Further, as noted by Sykes and Glasbeek, as awards generally operated to set minimum terms and conditions of employment, and over-award bargaining was not

⁷ The outright ban on strike action contained within s 6 of the original *Commonwealth Conciliation and Arbitration Act 1904* was repealed in 1930 by the *Commonwealth Conciliation and Arbitration Amendment Act 1930*, partially in recognition of the failure of conciliation and arbitration to effect industrial peace. For discussion of the 1930 amending Act see G. Sawyer, *Australian Federal Politics and Law 1929 – 1949* (Melbourne University Press: Melbourne, 1963) at 1-4.

⁸ Creighton and Stewart, *supra* note 2 at 18-19, para 1.43.

⁹ For a short history of the relationship of the Australian Industrial Relations Commission (AIRC) and industrial conflict including strike action over the 100 year history of the Commission see B. Harley, 'Managing Industrial Conflict' in J. Isaac and S. Macintyre, (eds.) *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press: Cambridge, 2004), 316.

¹⁰ E.I. Sykes and H.J. Glasbeek, *Labour Law in Australia* (Butterworths: Sydney, 1972) at 368; Sykes *supra* note 2.

prohibited, the system could have been considered to encourage industrial action to seek outcomes over the minimum set by the award.¹¹

The second oddity of the conciliation and arbitration system was the enforcement paradox identified and explored by Creighton.¹² Under conciliation and arbitration strike action was unlawful, with the potential to attract a wide range of civil penalties or statutory sanctions. However, these measures were rarely utilised in practice and led to a dichotomy between the availability of sanctions and the willingness of participants in the industrial arena to use them.¹³

The conciliation and arbitration model struggled to accommodate strike action. The role of strikes within the system was incongruous. Strikes were unlawful but rampant. Enforcement mechanisms abounded, yet until the mid 1980's, few efforts were made to enforce them.¹⁴ In addition, there were difficulties with the relationship of Australian law and practice to international labour standards, particularly those concerning the principle of freedom of association contained within International Labour Organization (ILO)¹⁵ Conventions ratified by Australia in the early 1970s.¹⁶

In 1991, the ILO Committee on Freedom of Association (CFA) determination in the Pilots' Dispute drew attention to the difficulties involved in reconciling the compulsory aspects of the Australian conciliation and arbitration model with

¹¹ Sykes and Glasbeek, *supra* note 10 at 370-372 and 586-587.

¹² B. Creighton, 'Enforcement in the Federal Industrial Relations System: An Australian Paradox' (1991) 4 *Australian Journal of Labour Law* 197.

¹³ *Ibid* at 4.

¹⁴ In the 1980s employers in Australia became more prepared to utilise the industrial torts and the *Trade Practices Act* 1974 (Cth). This preparedness went beyond obtaining injunctive relief and saw the award, or negotiated settlement of, substantial damages payouts against trade unions. See for example: P. Costello, 'Dollar Sweets: Confronting Union Power' (1985-6) 39 *IPA Review* 49; M. Pittard, '*Mudginberri Station Pty Ltd v. Australasian Meat Industry Employees' Union*' (1986) 14 *Australian Business Law Review* 130; M. Pittard, 'Industrial Law and Relations' (1986) 14 *Australian Business Law Review* 519.

¹⁵ The spelling of 'organization' in this study is consistent with current usage by the International Labour Organization (ILO). For convenience, spelling of the word 'organization' in all contexts will be consistent with the ILO usage, even where the original text uses 'organisation' rather than 'organization'.

¹⁶ Australia ratified two ILO Conventions on the principle of freedom of association on 28 February, 1973: *The Freedom of Association and Protection of the Right to Organise Convention*, 1948, No. 87, and *The Right to Organise and Collective Bargaining Convention*, 1949, No. 98 (the 'Freedom of Association Conventions'). (Ratification information sourced from the *Applis* database of international labour standards at www.ilo.org).

international standards on free collective bargaining and the right to strike.¹⁷ This led Creighton to note that: “[i]t is not inconceivable that the entire concept of ‘compulsory arbitration’ could be found incompatible with the ILO standards regarding freedom of association”.¹⁸ Further, increasingly globalisation and economic integration demanded that the insular approach of successive Australian governments to labour relations be abandoned in favour of increased engagement with the international community in economic matters.¹⁹

The perceived need for change within the Australian labour relations system led to the passage, in 1993, of the *Industrial Relations Reform Act 1993* (Cth).²⁰ Conciliation and arbitration was modified substantially, with a model of free collective bargaining enshrining an express right to strike.²¹ The transformation was consolidated with the election of a Coalition Government and the passage of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (WROLAA).²² Through the passage of these Acts, bargaining was altered from an incidental element of conciliation and arbitration, existing in the form of over-award bargaining, to a central plank of the new voluntary collective bargaining model, with strike assuming a central role as a tool of bargaining.²³

Australian labour law and practice have altered significantly since the introduction of voluntary collective bargaining. This study will explore the modern context, examining the role and regulation of strike action within the contemporary federal

¹⁷ *Complaint Against the Government of Australia presented by the International Federation of Air Line Pilots Associations (IFALPA)*, Document Vol. LXXIV, 1991, Series B, No. 1, Report 277, Case 1511.

¹⁸ Creighton *supra* note 12 at 210.

¹⁹ See B. Creighton, ‘The ILO and the Internationalisation of Australian Law’ (1995) 11 *International Journal of Comparative Labour Law and Industrial Relations* 199; B. Creighton, ‘The Internationalisation of Labour Law’ in R. Mitchell, (ed.) *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (Centre for Employment and Labour Relations Law: Parkville, 1995), 90 (hereafter cited as Creighton, 1995A).

²⁰ For comprehensive discussion of the *Industrial Relations Reform Act 1993* (Cth) (the Reform Act) see the *Australian Journal of Labour Law* (1994) 7(2).

²¹ For discussion of the enactment of a right to strike under the Reform Act see G. McCarry, ‘Sanctions and Industrial Action: The Impact of the Industrial Relations Reform Act’ (1994) 7 *Australian Journal of Labour Law* 198.

²² For comprehensive discussion of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (WROLAA) see the *Australian Journal of Labour Law* (1997) 10(1).

²³ Discussion of the WROLAA in respect to strike action can be found in: G. McCarry, ‘Industrial Action Under the *Workplace Relations Act*’ (1997) 10 *Australian Journal of Labour Law* 137.

labour law regime in the context of international principles concerning the right to strike.

The thesis examines the law prevailing in the federal labour relations system, which is the dominant system among the six in Australia. Each of the States (other than Victoria, which has transferred jurisdiction to the Commonwealth), has regulated strike action in different ways, with more or less commonality of approach to that in the Commonwealth. To some extent, then, the analysis in the thesis may be applicable to State jurisdictions.²⁴

The Australian Relationship with International Labour Standards

Australia is a founding member of the ILO, maintaining both general membership and ILO Governing Body membership for the majority of the history of the organization.²⁵ However, engagement at the domestic level with ILO standards involving considered reflection on Australian law did not occur until the beginning of the 1990s. Australian engagement before that time was typical of the Western developed world. The problems of the third world, such as forced labour and child exploitation, were regarded as the realm of the ILO.²⁶ Developed nations like Australia with progressive labour relations systems saw themselves as immune from critique.²⁷ However, the 1991 CFA determination in the Pilots' Dispute brought the Australian system under scrutiny with a particular focus on the failure of the system to accommodate a right to strike.²⁸

Since the 1991 determination, Australian labour law has undergone radical changes. It has been subject to ILO scrutiny on a number of occasions, and increasingly the ILO

²⁴ Coverage of the provision of a right to strike within the State industrial relations systems can be found in: M. Pittard and R. Naughton, *Australian Labour Law: Cases and Materials*, (4th ed., Butterworths: Chatswood, 2003) at 1062-1064; Creighton and Stewart, *supra* note 2 at 414-416.

²⁵ The structure and machinery of the International Labour Organization (ILO) are discussed in detail in chapter 3.

²⁶ R. McCallum, 'International Standards in Industrial Relations and their Application in Australia' (1995) 2 *Judicial Review* 164 at 165.

²⁷ *Ibid.*

²⁸ *Complaint Against the Government of Australia*, *supra* note 17.

has been prepared to take issue with elements of Australian labour law and practice.²⁹ Ironically, this increased scrutiny has come at a time when Australian involvement in the ILO has reduced to an historical low. In 1996 the Australian Government resigned from the ILO Governing Body, withdrew the Government appointed Special Labour Adviser to the ILO and reduced funding for trade union and employer ILO participation to the bare minimum required under ILO membership criteria.³⁰ This withdrawal of involvement was accompanied by increased reluctance on the part of the Australian Government to engage in meaningful dialogue with the ILO over compliance issues relating to ratified Conventions. Observations by ILO bodies, particularly the Committee of Experts on the Application of Conventions and Recommendations (CEACR) relating to Australian adherence to Convention 87 *The Freedom of Association and Protection of the Right to Organise Convention* 1948, have involved a fruitless dialogue between the ILO and the Australian Government over differing interpretations of the Convention, approaches to the principle of freedom of association, and opinions as to the steps necessary in order to fully implement and comply with the Convention.³¹

This fundamental shift in the Australian relationship with the ILO coincides with increased international scrutiny of the ILO role in international standard setting. In particular, commentators have pointed to the plethora of standards established over the history of the organization, the continued application of outdated standards, increasing Convention adoption rates alongside decreasing ratification rates and the

²⁹ For example, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) is responsible for reviewing ILO Member State Reports on ratified Conventions. The Observations of the CEACR on the *Workplace Relations Act* 1996 (Cth) (WRA) and its compliance with the Freedom of Association Conventions of 2003 and 2004 have been critical of the WRA with respect to the restrictions placed on access to the right to take strike action free from legal liability. Further, in 2000, an ILO Committee on Freedom of Association (CFA) determination arising out of the waterfront dispute was critical of aspects of the WRA: *Complaint Against the Government of Australia presented by the International Confederation of Free Trade Unions (ICTFU), the International Transport Workers' Federation (ITF), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA)*, Document Vol. LXXXIII, 2000, Series B, No. 1, Report 320, Case 1963. For discussion of the criticism of Australian law and practice by the ILO bodies see chapter 8.

³⁰ B. Creighton, 'The ILO and the Protection of Fundamental Human Rights in Australia' (1998) 22 *Melbourne University Law Review* 239 at 279; M. Davis, 'The International Rules Australia Won't Play By' *Australian Financial Review*, September 11, 1996, 15; N. Ruskin and L. Smith, 'The Role and Impact of International Labour Organization Standards in the Australian Workplace' (1998) 40 *Journal of Industrial Relations* 314 at 325.

³¹ For discussion of this dialogue between the CEACR and the Australian Government see chapter 8, page 253-257.

growth in influential labour norms outside the ILO, in particular in Europe, the old power base of the ILO.³² Partly in response to these perceived problems, and as the result of the appointment of a new Director General of the ILO, the organization responded in 1998 with the passage of the *Declaration on Fundamental Principles and Rights at Work*.³³ The Declaration reaffirmed the ILO commitment to the four fundamental core labour standards: the abolition of forced labour, the abolition of child labour, the abolition of discrimination in employment and freedom of association. The Declaration committed all Member States of the ILO, regardless of their ratification of relevant Conventions, to respect, promote and realise the fundamental rights.³⁴

The passage of the Fundamental Declaration has assisted in revitalising the role of the ILO in the modern human rights context. The consistent and unified manner in which the ILO has treated workers' rights as core human rights has led to human rights

³² The challenges facing the ILO have been explored by many authors, for example: P. Alston, 'Post-post-modernism and International Labour Standards: The Quest for a New Complexity' in W. Sengenberger and D. Campbell, (eds.) *International Labour Standards and Economic Interdependence* (International Institute for Labour Studies: Geneva, 1994), 95; H. G. Bartolomei de la Cruz, 'International Labour Law: Renewal or Decline?' (1994) 10 *International Journal of Comparative Labour Law and Industrial Relations* 201; H. G. Bartolomei de la Cruz, G. von Potobsky and L. Swepston, *The International Labor Organization: The International Standards System and Basic Human Rights* (Westview Press: Boulder, 1996), chapter 5; S. Cooney, 'Testing Times for the ILO: Institutional Reform for the New International Political Economy' (1999) 20 *Comparative Labor Law and Policy Journal* 365; E. Cordova, 'Some Reflections on the Overproduction of International Labor Standards' (1993) 14 *Comparative Labor Law Journal* 138; Creighton, *supra* note 19 at 93; Creighton (1995A) *supra* note 19 at 207; I. A. Donoso Rubio, 'Economic Limits on International Regulation: A Case Study of ILO Standard-Setting' (1998) 24 *Queens Law Journal* 189; L. Swepston, 'The Future of ILO Standards' (1994) *Monthly Labour Review*, September Issue, 16. A. Frazer and C. Nyland, 'In Search of the Middle Way: The ILO, Standard Setting and Globalisation' (1997) 10 *Australian Journal of Labour Law* 280 at 280 examined the challenges facing the ILO in the context of the 1997 ILO Director General's Report that identified the threats facing the ILO, noting that: "The undermining of basic values [experienced in many ILO Member States] is furthered by the wide acceptance of the new utopianism which advocates an ideal world in which human action is answerable only to the laws of economic rationality". In recent years a new challenge to international labour standards has arisen in the form of the "ratcheting labour standards" proposal: J. Murray, 'The Sound of One Hand Clapping? The Ratcheting Labour Standards Proposal and International Labour Law' (2001) 14 *Australian Journal of Labour Law* 306.

³³ For discussion of the *Declaration on Fundamental Principles and Rights at Work* 1998 see: J. Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work' (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 269; C. Coxson, 'The 1998 ILO Declaration on Fundamental Principles and Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Imposing Coercive Trade Sanctions' (1999) 17 *Dickinson Journal of International Law* 469; H. Kellerson, 'The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future?' (1998) 137 *International Labour Review* 223.

³⁴ *Declaration on Fundamental Principles and Rights at Work*, ILO, 1998, Document CIT/1998/PR20A, Article 2.

scholars engaging with 'labour law' and looking to the ILO for leadership.³⁵ The ILO has an extremely well developed supervisory structure that has been increasingly lauded as a model of effective supervision for systems lacking positive enforcement mechanisms.³⁶ Further, the tripartite nature of the organization provides a forum for input from workers, employers and governments in the development of new standards and the ongoing supervision of old standards. This lends a degree of legitimacy to the standards of the ILO that cannot be claimed by any other international human rights body.³⁷

The revitalisation of the ILO and its renewed commitment to obtaining compliance with core labour standards suggests that Australian compliance with ILO standards is of ongoing importance. Since the enactment of the *Industrial Relations Reform Act* in 1993 which relied heavily upon international standards for constitutional competence, and the opening up of the Australian economy to international competition, the Australian labour market has been increasingly internationalised. However, progress with internationalisation of the Australian economy has not been matched by a corresponding commitment to international standards. Commitment to international labour standards in Australia is necessary in order to maintain domestic labour standards; encourage competitor nations to adhere to those standards and enhance the role of Australia within the international community. While the ideological approach of the Australian Government and the determinative bodies of the ILO may be divergent at present, this may not always be the case. In any event, it remains the case the Australia has undertaken international legal obligations and cannot escape scrutiny.

³⁵ For example: V. Leary, 'Lessons from the Experience of the International Labour Organization' in P. Alston, (ed.) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press: Oxford, 1992), 580; V. Leary, 'The Paradox of Workers Rights as Human Rights' in L. Compa and S. Diamond, (eds.) *Human Rights, Labor Rights and International Trade* (University of Pennsylvania Press: Philadelphia, 1996), 22; N. Valticos, 'International Labour Standards and Human Rights: Approaching the Year 2000' (1998) 137 *International Labour Review* 135.

³⁶ Leary 1992, supra note 35. Also see L. Swepston, 'The International Labour Organization and Human Rights Access to the ILO' in G. Alfredsson, J. Grimheden, B. Ramcharan and A. de Zayas, (eds.) *International Human Rights Monitoring Mechanisms - Essays in Honour of Jakob Th. Moller* (Kluwer Law International: The Hague, 2001), 485.

³⁷ Leary 1996, supra note 35 at 42.

Contribution Made by the Thesis

The aim of the thesis is to measure the extent to which the Australian legal framework with respect to strike action complies with voluntarily assumed international obligations on the right to strike. This will involve engagement with literature concerning the nature of the right to strike in international law and the domestic implementation of, and compliance with, with international law. It will make contributions to each of these areas, building upon and adding to work undertaken in the international and domestic arenas.

The right to strike in international law

The first section of the thesis explores the nature of the right to strike in international law and reveals the relationship between the right to strike and the fundamental principle of freedom of association. This work engages with a relatively small field of literature on the topic of strike.

There are three main treatises on the sources, content and scope of the right to strike as expressed within, or implied in, international instruments to which Australia is a party. The first is the study, published in 1988, by Ruth Ben-Israel, *International Labour Standards: the Case of Freedom to Strike* in which she sketched the: “full and detailed content of the international labour standard concerning the right to strike”.³⁸

The study made three important contributions to the general understanding of the right to strike in international law. First, it provided a detailed historical account of the adoption of ILO Conventions 87 *The Freedom of Association and Protection of the*

³⁸ Ben-Israel, *supra* note 1 at 7. Ben-Israel’s study of the right to strike in international law represented the first systematic and thorough treatise on this issue. The question of scope and extent of the right had been considered in less detail before by Betten: L. Betten, *The Right to Strike in Community Law* (Elsevier Science Publishers: North Holland, 1985). Chapter Seven provided a brief outline of the supervisory structures, complaint mechanisms of the European Social Charter, the ICESCR and the Conventions of the ILO. The chapter further sought to elaborate upon the scope and content of the right to strike as expressed (or implicit) within each relevant instrument. In addition, before Ben-Israel published her study, the *International Labour Review* published an article reviewing the determinations of the Committee on Freedom of Association on strikes: J. Hodges-Aeberhard, and A. Dios de Otero, ‘Principles of the Committee on Freedom of Association Concerning Strikes’ (1987) 126 *International Labour Review* 543. There was also an earlier article, which considered the right to strike within the context of the principle of freedom of association: J. M. Servais, ‘International Labour Organization

Right to Organise Convention 1948, and 98 *The Right to Organise and Collective Bargaining Convention*, 1949 (the 'Freedom of Association Conventions') and the decision of the drafters of the Conventions not to include an express right to strike.³⁹ The absence of express inclusion of the right to strike in Conventions 87 and 98 is one of the great weaknesses of the right to strike in the ILO context. However, Ben-Israel concluded from her analysis that this decision reflected the predominant view of the ILO Conference at the time of adoption that the right to strike was an integral component of the principle of freedom of association, making it unnecessary to provide express or separate protection.⁴⁰ Second, the study documented the right to strike in international law and the basis upon which ratifying States are bound to recognise the right in domestic law. Ben-Israel concluded that the right to strike is an express treaty based right under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and also a treaty based labour standard, implicit in the principle of freedom of association, as expressed within the Constitution of the ILO and the ILO Freedom of Association Conventions.⁴¹ Third, the study provided a summary, albeit uncritical, of the scope and extent of the implicit right to strike within ILO Freedom of Association Conventions.⁴²

The second treatise is a recent compilation of ILO principles on the right to strike by Gernigon, Odero and Guido. First published as an article in the *International Labour Review*, 'ILO Principles Concerning the Right to Strike', and later republished in pamphlet form and released by the International Labour Office, the paper summarises the views of relevant ILO bodies with respect to the right to strike.⁴³ The treatise represents a useful survey of the principles in this area and gives insight into the reasoning of ILO bodies. However, while it consolidated the material compiled by Ben-Israel to 1998, it did not engage in any critical assessment of the commentary.⁴⁴

Standards on Freedom of Association and their Implementation' (1984) 123 *International Labour Review* 765.

³⁹ Ibid at 35-70.

⁴⁰ Ibid.

⁴¹ Ibid at 70 and 92.

⁴² Ibid at Part III.

⁴³ B. Gernigon, A. Odero and H. Guido, 'ILO Principles Concerning the Right to Strike' (1998) 137 *International Labour Review* 441; B. Gernigon, A. Odero and H. Guido, *ILO Principles Concerning the Right to Strike* (International Labour Office: Geneva, 2000).

⁴⁴ In between the publication of Ben-Israel's study and this survey, the principles relating to the right to strike were also described within the context of other works on the principle of freedom of association

The third study is Tonia Novitz's, *International and European Protection of the Right to Strike* (2003).⁴⁵ The work is a comparative survey of standards set by the ILO, the Council of Europe and the European Union. Of relevance to this thesis is the aspect of the study that surveys the instruments of the ILO and the United Nations (UN). The survey of ILO principles revisits the material covered by Ben-Israel by examining the adoption of the Freedom of Association Conventions and the decision to exclude an express right to strike.⁴⁶ The study also provides a useful comparative survey of the principles relating to the right to strike within the European Union, the ILO and UN Conventions.⁴⁷

These studies represent the three main secondary sources of coverage of the scope and content of the right to strike under international instruments to which Australia is a party. The ground has been traversed by other authors in the context of specialist studies or in the context of general treatises on international labour law.⁴⁸ With respect to specialist texts, Matthew Craven in his study of the ICESCR pays some attention to the scope of Article 8(1)(d) of the Covenant, which sets out an express obligation on ratifying States to recognise the right to strike.⁴⁹ However this study is not exhaustive with respect to the scope of the right to strike. It focuses on other provisions within Article 8, particularly the limitation provisions. Also in this vein is

within the ILO, for example: L. Swepston, 'Human Rights Law and Freedom of Association: Development through ILO Supervision' (1998) 137 *International Labour Review* 169 at 186-190.

⁴⁵ T. Novitz, *International and European Protection of the Right to Strike*, (Oxford University Press: Oxford, 2003). Fenwick discusses this study in the Australian context: C. Fenwick, 'International Law on the Right to Strike' (2004) 17 *Australian Journal of Labour Law* 125.

⁴⁶ Ibid at 109 – 124.

⁴⁷ Ibid. Comparative jurisprudence relating to the scope of the right to strike within European, ILO and UN instruments is set out in Part IV, chapters 11-14.

⁴⁸ There is also some coverage of the right to strike within generalist international labour law texts. The two texts of significance are L. Betten, *International Labour Law: Selected Issues* (Kluwer Law and Taxation Publishers: Deventer, 1993) and N. Valticos and G. von Potobsky, *International Labour Law* (2nd ed., Kluwer Law and Taxation Publishers: Deventer, 1995). Each contains limited surveys of the scope of the right to strike as expressed in international law and implicit in the ILO Freedom of Association Conventions, but these studies are not comprehensive and draw largely upon Ben-Israel. Betten discussed the right to strike implicit in the Conventions of the ILO and the express right to strike within the *European Social Charter* at 110-118 but does not look at the ICESCR. Valticos and von Potobsky examine the right to strike within the *European Social Charter* at 94-95 and the implicit right to strike in the Conventions of the ILO at 85-86. A recent example of coverage of ILO principles on the right to strike in the context of coverage of the principle of freedom of association is B. Creighton, 'Freedom of Association' in R. Blanpain, (ed.) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (Kluwer Law International: The Hague, 2004), 233 at 267-271.

an article by Rolf Birk, 'Derogations and Restrictions on the Right to Strike Under International Law', surveying permissible derogations and restrictions upon the right to strike as expressed in Article 8(1)(d).⁵⁰

Accordingly, the survey of the international right to strike in this thesis makes two important contributions to the literature. First, it consolidates, updates and expands the work of Ben-Israel and Gerningon, Odero and Guido, and complements the comparative study undertaken by Novitz. Secondly, it critically examines and explores the right to strike as a facet of the principle of freedom of association in international law, an area which is under-developed in the literature.

International Standards and Domestic Compliance

The second aspect of this thesis is to explore the Australian federal legal framework regulating strike action and measure the extent to which it complies with the voluntarily assumed international obligations previously established. This aspect of the study is consistent with the recent trend in Australian academic literature to actively engage with international labour standards and provide critical analysis of the extent of Australian compliance.

As discussed above, in the context of engagement by Australian governments with international labour standards, the 'internationalisation' of Australian labour law can be traced from ILO criticism of Australia in 1991 and the passage of the *Industrial Relations Reform Act* (Cth) in 1993. Contemporary commentary was largely focused on the role of the ILO, the continued relevance of international labour standards and

⁴⁹ M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press: Oxford, 1995) at chapter 7.

⁵⁰ R. Birk, 'Derogations and Restrictions on the Right to Strike Under International Law' in R. Blanpain, (ed.) *Labour Law, Human Rights and Social Justice* (Kluwer Law International: The Hague, 2001), 95. Birk also considers permissible derogations and restrictions on the right to strike within the European Social Charter and the implied right to strike recognised by the ILO. However, the paper does not provide in-depth coverage of the ILO right to strike and the sections on the European Social Charter are outside the scope of this discussion. Also of relevance is P. Alston and G. Quinn, 'The Nature and Scope of States Parties' Obligations Under the International Covenant of Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156. This article provides guidance for the interpretation of the ICESCR and the nature and scope of States Parties' obligations under the Covenant. While the article is useful with respect to the appropriate interpretation of the Covenant, and the meaning and effect of the limitations clauses, it does not give any consideration of the meaning or extent of Article 8(1)(d) of the ICESCR.

the changing nature of Australia's relationship with international standards.⁵¹

Alongside this general engagement with international standards, a focus on the issue of compliance by Australian law with applicable standards began to emerge in the literature. In addition, recent Australian literature has engaged with ILO standards as an independent topic of scholarly interest.⁵²

In terms of consideration of compliance issues on a broad scale, Creighton has produced a significant and important body of literature examining the issue of Australian engagement with international standards and the degree to which various areas of Australian labour law can be considered to comply with these standards. As early as 1991, Creighton questioned the degree to which compulsion within the conciliation and arbitration system was compatible with international standards on the principle of freedom of association.⁵³ In 1997, Creighton took a whole of Act approach to the *Workplace Relations Act* 1996 (Cth) examining the extent to which the Act was consistent with Australia's international obligations in the area of labour standards.⁵⁴ This study was enhanced in 1998 by Creighton in a study of Australian compliance with the four core labour standards now embodied within the ILO *Fundamental Declaration of Principles and Rights at Work* 1998.⁵⁵

⁵¹ For example: Creighton, *supra* note 19; Creighton 1995A, *supra* note 19; McCallum, *supra* note 26; R. McCallum, 'The Internationalisation of Australian Industrial Law: The Industrial Relations Reform Act 1993' (1994) 15 *Sydney Law Review* 122; and M. Pittard, 'International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment' (1994) 7 *Australian Journal of Labour Law* 170. Further, in 1993 Creighton examined the question of the legal application of international law in Australia, specifically with respect to international labour standards: B. Creighton, 'Industrial Regulation and Australia's International Obligations' in P. Ronfeldt and R. McCallum, (eds.) *A New Province for Legalism: Legal Issues and the Deregulation of Industrial Relations* (ACCIRT: Sydney, 1993), 101.

⁵² For example Cooney, *supra* note 32; C. Fenwick, 'The ILO Commission of Inquiry into Forced Labour in Burma' (1999) 12 *Australian Journal of Labour Law* 43; M. Kirby, 'Human Rights and Industrial Relations' (2002) 44 *Journal of Industrial Relations* 562; R. Layton, 'Forced Labour in Burma: A Summary of the International Labour Organization Report and Subsequent Developments' (2000) 4 *Southern Cross University Law Review* 148; J. Murray, *Social Justice for Women? The ILO's Convention on Part-Time Work*, Centre for Employment and Labour Relations Law, Working Paper No. 15 (CELRL, University of Melbourne: Parkville, 1999); J. Murray, *Transnational Labour Regulation: The ILO and EC Compared* (Kluwer Law International: The Hague, 2001); Murray, *supra* note 32.

⁵³ Creighton, *supra* note 12 at 210 – 212. This issue was also examined in 1993 by McEvoy and Owens commenting on the CFA determination in the Pilots' Dispute: K. McEvoy and R. Owens, 'On a Wing and a Prayer: The Pilots Dispute in the International Context' (1993) 6 *Australian Journal of Labour Law* 1.

⁵⁴ B. Creighton, 'The Workplace Relations Act in International Perspective' (1997) 10 *Australian Journal of Labour Law* 31.

In addition to this body of work on compliance issues at a general level, there is a growing body of literature examining issues related to compliance with specific instruments. For example, Chapman has examined the influence of ILO standards on unfair dismissal,⁵⁶ Creighton has measured compliance with child labour Conventions,⁵⁷ Fenwick has drawn upon ILO Conventions in discussing the regulation of prison labour,⁵⁸ Murray has discussed the issue of freedom of association in the context of the maritime dispute,⁵⁹ and Sharard has considered the ILO collective bargaining principles in the context of the *Industrial Relations Act* (as amended in 1993).⁶⁰ However, there has been no systematic study of Australian compliance with international labour standards on the right to strike and the principle of freedom of association considered from the perspective of strike action.⁶¹ Therefore, this thesis complements the existing literature, drawing upon and expanding previous studies and represents the first systematic study of Australian compliance with respect to international standards on the right to strike.

Measuring Compliance

Approach of Thesis

The approach to the task of measuring compliance will be canvassed in detail in chapter 8. Briefly, there are three main components. First, the thesis will examine the legal structures within both the ILO and the federal workplace relations system in order to establish the manner in which both structures accommodate the right to strike. Second, the thesis will consider any areas of practical divergence from the

⁵⁵ Creighton, *supra* note 30.

⁵⁶ A. Chapman, 'The Declining Influence of ILO Standards in Shaping Australian Statutory Provisions on Unfair Dismissal' (2003) 29 *Monash University Law Review* 104.

⁵⁷ B. Creighton, 'ILO Convention No 138 and Australian Law and Practice Relating to Child Labour' (1996) 2 *Australian Journal of Human Rights* 293.

⁵⁸ C. Fenwick, 'Regulating Prisoners' Labour in Australia: A Preliminary View' (2003) 16 *Australian Journal of Labour Law* 284.

⁵⁹ J. Murray, 'Australia in the Dock: the ILO's decision on the Waterfront Dispute' (2000) 13 *Australian Journal of Labour Law* 167.

⁶⁰ T. Sharard, *Competing Models of Worker Representation – the ILO Collective Bargaining Principles and Part VIB of the Industrial Relations Act 1988*, Centre for Employment and Labour Relations Law, Working Paper No. 10 (CELRL, University of Melbourne: Parkville, 1996).

⁶¹ Note S. McCrystal, 'The Right to Strike: International Treaties and Covenants', Appendix One in *The Law Relating to Industrial Action in the Building and Construction Industry*, A paper prepared by the Faculty of Law at Monash University for the Royal Commission into the Building and Construction Industry, Discussion Paper 18, November, 2002, 150. This paper surveys international instruments and

legal framework to measure compliance from both a legal and practical perspective. Finally, drawing upon the literature and the legal and practical framework, the study will draw conclusions about the nature of the right to strike in both the international and domestic contexts.

Comparative Literature

The objective of the thesis is to examine the extent to which domestic Australian law complies with international legal standards. While this is not a comparative exercise (in the sense of comparing alternate legal systems), the literature exploring comparative labour law provides useful guidance with respect to the task undertaken by this thesis.

There is a wealth of comparative work on strike law, providing a basis for comparison of the laws concerning strikes within domestic systems. A core resource is NATLEX, a database maintained by the ILO which contains references to over 55,000 national laws on labour, social security and related human rights.⁶² Another core resource is the *International Encyclopaedia of Comparative Labour Law* that sets out comparative analysis of the labour laws of different nations.⁶³ Further, the regularly published work *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* always contains a chapter on strikes and lockouts, frequently one on freedom of association and chapters on the resolution of industrial disputes outlining the law in a variety of systems.⁶⁴ A more specific study in the context of laws regulating strike action is *Strikes and Lockouts in Industrialised Market*

related commentary of ILO bodies in respect to Australian compliance but does not systematically analyse Australian compliance with international standards on the right to strike.

⁶² ILO, NATLEX database – <http://natlex.ilo.org>.

⁶³ See for example, R. Ben-Israel, 'Strikes, Lockouts and Other Kinds of Hostile Actions' in B. Hepple, (ed.) *International Encyclopedia of Comparative Law* (Martinus Nijhoff Publishers: Dordrecht, 1997), vol 15; J. de Givry, 'Prevention and Settlement of Labour Disputes, Other than Conflicts of Rights', *International Encyclopedia of Comparative Law*, (JCB Mohr, Tübingen and Sitjhoff and Noordhoff: Alphen, 1978).

⁶⁴ R. Blanpain, (ed.) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (8th ed., Kluwer Law International: The Hague, 2004) contains the following relevant chapters: chapter 11, 'Freedom of Association' by B. Creighton; chapter 21, 'The Law of Strikes and Lock-Outs' by A.T.J.M. Jacobs; chapter 22, 'Settlement of Disputes Over Rights' by A. Gladstone; and chapter 23, 'Settlement of Disputes Over Interests' by A. Goldman.

Economies.⁶⁵ This is a comparative study, published in 1994, detailing the law relating to strikes and lockouts across eleven countries including an introduction to the law of strikes and lockouts by Ben-Israel.⁶⁶

Of particular value to the study undertaken in this thesis is the theoretical and critical literature on comparativism. It is best exemplified by the works of Kahn-Freund,⁶⁷ Blanpain⁶⁸ and Mitchell (with other authors).⁶⁹ Kahn-Freund, while encouraging comparative study, warns against the wholesale transplantation of laws and institutions, especially between countries with different political power structures, arguing that “we cannot take for granted that rules or institutions are transplantable”.⁷⁰ He considers that there would be difficulty in accommodating a new system, if power in one society operated differently in the other. Further, in a recent paper, Cooney and Mitchell demonstrate that while the location of political power is an important factor in transplantation, other factors, including social and economic forces, will also mitigate against the transplantation of labour laws.⁷¹

In a similar vein, considering the domestic application of international standards, Von Prondzynski warns that “[t]he danger in applying international standards ... is to assume that there is one global scale on which performance of individual states can be

⁶⁵ R. Blanpain and R. Ben-Israel, (eds.) *Strikes and Lock-Outs in Industrialised Market Economies* (Kluwer Law and Taxation Publishers: Deventer, 1994).

⁶⁶ R. Ben-Israel, ‘Introduction to Strikes and Lock-outs: a Comparative Perspective’ in R. Blanpain and R. Ben-Israel, (eds.) *Strikes and Lock-Outs in Industrialised Market Economies* (Kluwer Law and Taxation Publishers: Deventer, 1994), 1.

⁶⁷ O. Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 *Modern Law Review* 1.

⁶⁸ R. Blanpain, ‘Comparativism in Labour Law and Industrial Relations’ in R. Blanpain and C. Engels, (eds.) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (Kluwer Law International: The Hague, 2001), 3.

⁶⁹ S. Cooney, T. Lindsey, R. Mitchell and Y. Zhu, ‘Labour Law and Labour Market Regulation in East Asian States’ in S. Cooney, T. Lindsey, R. Mitchell and Y. Zhu, (eds.) *Law and Labour Market Regulation in East Asia* (Routledge: London and New York, 2002), 3; R. Mitchell and J. Min Aun Wu, ‘Introduction: Pressures on the Concept of Labour Law in the Asia-Pacific Region’ in R. Mitchell and J. Min Aun Wu, (eds.) *Facing the Challenge in the Asia-Pacific Region: Contemporary Themes and Issues in Labour Law* (Occasional Monograph No. 5, Centre for Employment and Labour Relations Law, University of Melbourne: Parkville, 1997), x; S. Cooney and R. Mitchell, ‘Labour Relations and the Law in Three East Asian NICs: Some Problems and Issues For Comparative Labour Law Inquiry’ (Paper presented at the Global Integration and Challenges for Industrial Relations and Human Resource Management in the Twenty-First Century, Tokyo, 29 May - 2 June 2000).

⁷⁰ Kahn-Freund, *supra* note 67 at 27.

⁷¹ Cooney and Mitchell, *supra* note 69.

measured”.⁷² Herein lies the difficulty – do international labour standards truly constitute universal standards that can be implemented without reference to historical, cultural and ideological factors? For Blanpain, international standards that set minimum protective standards readily lend themselves to domestic application.⁷³ However, those standards affected by power relations in domestic systems, like freedom of association, collective bargaining and the right to strike, are “resistant to transplantation”, because their implementation and application depend more heavily upon acceptance by existing societal power structures.⁷⁴ It is for this reason, argues Blanpain, that ILO standards on freedom of association are drafted in cautious flexible terms adaptive to a range of legal structures.⁷⁵ Forde advocates caution with respect to standards adjusted through the interpretation of instruments by international jurists, due to the complexities involved in setting out common standards:

[e]specially at the international level, there is a grave danger of amateurs, no matter how eminent they may be as jurists, tinkering with arrangements they do not fully understand, and tending to impose standards that may work in their own countries upon the entirely different labor market systems of other States.⁷⁶

The insight from this literature is that the assessment of the compatibility of Australian law with international standards must not ignore the political and ideological factors at play in the formulation and application of those standards. Just as domestic systems do not develop law in a vacuum; neither do international standards emerge fully formed without the influence of political and ideological factors. Accordingly, in the assessment of the content of international standards with respect to the right to strike, the analysis will take into account the factors that have shaped those standards.

Structure of the thesis

The thesis is a case study of the Australian domestic implementation of voluntarily assumed international standards on the right to strike. Coverage of the topic will

⁷² F. von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (Mansell Publishing Ltd: London, 1987) at 25.

⁷³ Blanpain, *supra* note 68.

⁷⁴ *Ibid* at 20.

⁷⁵ *Ibid*.

require examination of both the international regime and the federal legal structure. This will set up a framework against which the thesis will measure the degree to which the federal model in Australia complies with the relevant international obligations.

Chapter 1 will outline the existence of the right to strike in international law, establishing the basis for recognition of the right and exploring its philosophical and ideological underpinnings. The chapter will discuss the nature of the right to strike as an implicit element of the principle of freedom of association and the extent of recognition of this principle within international law instruments and relevant domestic constitutions.

Chapters 2 and 3 will outline the content of the international obligation to respect the right to strike in detail through analysis of UN and ILO instruments, the principle of freedom of association and the commentary of international supervisory bodies.

Chapter 4 will draw together a series of observations on the right to strike in international law.

Chapters 5 and 6 will explore Australian federal law and practice concerning the right to strike. Beginning with a discussion of foundation and jurisdictional questions concerning Australian law and practice relating to the right to strike, the chapters will then examine the applicable legal framework in detail, covering contract, tort, criminal law, the TPA, and the WRA.

Chapter 7 will draw upon the survey of federal law relating to strike action undertaken in chapters 5 and 6, providing general observations on the nature of the right to strike within the federal system.

Chapter 8 will analyse and measure the extent to which the federal law (combining legislation and common law) complies with voluntarily assumed international

⁷⁶ M. Forde, 'The European Convention on Human Rights and Labor Law' (1983) 31 *American Journal of Comparative Law* 301 at 332.

obligations with respect to the right to strike. Compliance will be assessed as to specific aspects of the law and, equally important as to the sum of the parts.

The Conclusion will set out the key compliance findings arising out of the analysis undertaken in chapter 8. The Conclusion will set out the nature of Australian compliance with international standards on the right to strike, drawing upon the themes developed throughout the thesis.

Chapter One

The Right to Strike and Freedom of Association

Introduction

This study, in exploring the scope and content of the right to strike in international law, must first grapple with the legal basis of the obligation to provide a right to strike. As Ben-Israel observed,¹ the right to strike is an express treaty based right under the International Covenant on Economic, Social and Cultural Rights (ICESCR) and a treaty based labour standard, implicit in the principle of freedom of association, as expressed within the Constitution of the International Labour Organization (ILO) and the ILO's Freedom of Association Conventions (Conventions 87 and 98).² The express right will be examined in chapter 2 and the implicit right in chapter 3. This chapter will explore the philosophical underpinning of the right to strike in international law, and in particular the connection between strike action and collective bargaining and the overarching principle of freedom of association which is recognised within international law instruments and some domestic Constitutions.

Philosophical Underpinnings of the Right to Strike in International Law

The following discussion will examine the nature of the right to strike in international law, with specific attention to the relationship between the right to strike and the principle of freedom of association.

¹ Noted in the Introduction at 11-12: R. Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer Law and Taxation Publishers: Deventer, 1988) at 70 and 92.

² ILO Convention 87, *Freedom of Association and the Right to Organize* Convention 1948 and ILO Convention 98, *Right to Organize and Collective Bargaining* Convention 1949 (the 'Freedom of Association Conventions').

Freedom of Association and the Right to Strike

[T]he ongoing debate between individualists and collectivists ... is often the background on these issues ... the general principle that individual freedom is a central value ... [as opposed to] the principle that collective strength and trade union autonomy should be protected.³

Strike action is collective activity. The withdrawal of labour by an individual worker may occur in protest or as an exercise of bargaining power, but to engage in action properly considered 'strike action', the individual needs to act in concert: one component of a group withdrawal of labour.⁴ The ability to strike pre-supposes the freedom of workers to act in association. From this view, it can be seen that the freedom to associate with others is a prerequisite to the right to strike. However, the more difficult question relates to the issue of whether the freedom to associate necessarily involves the right to strike. The answer to this question alters depending on whether the answer is viewed through the prism of individual or collective rights.

It is important to review the relationship between freedom of association and the right to strike because recognition of the legitimacy of strike action by ILO bodies is based on the assumption of an implicit right to strike within the principle of freedom of association as expressed within ILO instruments. The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has consistently reaffirmed the existence of the implicit right to strike:

[u]nder Article 3(1) of Convention No. 87, the right to organize activities and to formulate programmes is recognized for workers' and employers' organizations. In the view of the Committee, strike action is part of these activities under the provisions of Article 3; it is a collective right exercised, in the case of workers, by a group of persons who decide not to work in order to have their demands met ... the Committee confirms its basic position that the right to strike is an intrinsic corollary of the right to organize protected by Convention No 87.⁵

³ S. Leader, 'The European Convention on Human Rights, The Employment Act of 1988 and the Right to Refuse to Strike' (1991) 20 *Industrial Law Journal* 39 at 40-41.

⁴ Examples of this view: O. Kahn-Freund and B. Hepple, *Laws Against Strikes* (Fabian Research Series: London, 1972) at 4; S. Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (Yale University Press: New Haven, 1992) at 25; L. J. McFarlane, *The Right to Strike* (Penguin Books: Middlesex, 1981) at 20.

⁵ International Labour Office, *Freedom of Association and Collective Bargaining, General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98) 1949*, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 81st Session 1994, Report III (Part 4B), Geneva (The 'General Survey, 1994'), paragraphs 149 and 151.

The ILO construction of an implicit right to strike within the principle of freedom of association is one of the principal, and the most comprehensive, sources of the Australian obligation to recognise the right to strike. In this context the first task is to construct the content of the principle of freedom of association. The second task is to examine the manner in which the content of the principle of freedom of association has been construed by national and supra national bodies.

Constructing the principle of freedom of association

Literature exploring whether or not the right to strike is implicit in the principle of freedom of association contains two divergent viewpoints. The first presents freedom of association as a freedom exercised by the individual, in which the individual member of society is free to join with other individuals within association. Once in association, the individual is free to do whatever they are at liberty to do within society as an individual, but no more.⁶ This view of freedom of association constructs the freedom as an individual freedom, offering the individual the freedom to associate with other individuals, but no protection for the purposes or activities of that association. It is based in the liberal tradition of Locke, Smith and more recently, Hayek, whereby the individual is the core unit of society, and all freedoms flow from the right of the individual to be free of interference from the State.⁷ Freedoms and rights, from a liberal perspective, are designed to leave the individual free from interference. Therefore, an association formed by a group of individuals has no more rights than each individual possesses. The freedom is not designed to facilitate the purposes of the individuals in associating, merely to protect their right to associate. In this sense, freedom of association is seen as a static, non-facilitative freedom.⁸

⁶ Examples of this view: P. A. Gall, 'Freedom of Association and Trade Unions: A Double Edged Constitutional Sword' in J. Weiler and R. Elliot, (eds.) *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Carswell: Toronto, 1986), 245; T. Sheppard, 'Liberalism and the Charter: Freedom of Association and the Right to Strike' (1996) 5 *Dalhousie Journal of Legal Studies* 117. For discussion of the individualist view of freedom of association within a broader context see: Leader, *supra* note 4 at chapter 3, 'The Source and Nature of the Right to Freedom of Association'; F. von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (Mansell Publishing Ltd: London, 1987), chapter 11; Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *Industrial Law Journal* 1.

⁷ Discussed in M. Moir, 'Individual and Collective Bargaining in Australian Labour Law: The *CRA Weipa Case*' (1996) 18 *Sydney Law Review* 350 at 356-360.

⁸ While the majority of liberal theorists construct the principle of freedom of association in this fashion, exclusive of collective bargaining and the right to strike, this view is not universal. Sheppard, *supra*

This construction of the principle of freedom of association also embraces the negative construction of the freedom, the freedom not to associate. As individuals must be free to do in association that which they can do as individuals, so must they be free to remain outside of association.⁹ This aspect of the liberal construction of freedom of association provides an interesting counterpoint to the second construction of the freedom advocated, the functional and collective view:

Those who place a premium on the right to disassociate usually begin from broadly individualist premises, while those who give it a lower priority usually do so because their sympathies are collectivist.¹⁰

As opposed to the static construction of the principle of freedom of association advocated by liberal theorists, those with collectivist sympathies construct freedom of association from a dynamic functional perspective. These theorists view the employment relationship through the prism of power imbalance. Freedom of association provides an essential means of correcting the imbalance allowing for parity within the industrial relations process.¹¹ The functional collectivist perspective constructs freedom of association as three-dimensional:

[f]reedom of association is in fact a principle with at least three dimensions ... The first is the right to be in association with others and not to suffer disadvantage as a result...
[the] second ... is the freedom of individuals to determine who they will associate with and on what terms ...[and]
The third is the right to act in association with others, for example to bargain collectively or to strike.¹²

The collective functional perspective constructs freedom of association within the context of industrial relations and power imbalance, serving the function of sustaining

note 6, advocates the liberal construction of freedom of association, but considers that the freedom embraces strike action as a freedom from non-interference. Sheppard argues at 149 that "[w]hat the unions are really seeking is the right to enter into the labour negotiation process without the fear of the State's coercive powers being used against them. It is a freedom they seek, the same freedom liberals seek for all individuals - the freedom from governmental interference". He further asserts at 164 that "[t]he moral imperative of liberalism demands that workers take care of their own well being and not rely upon their employers to do so. The liberal who objects to workers presenting a united front to their employer has not properly considered the key role that freedom of association has played in liberalism".

⁹ For discussion of the existence or otherwise of the negative aspect of the principle of freedom of association see: Leader, *supra* note 4, chapter 3; Prondzynski, *supra* note 6, chapter 11.

¹⁰ Leader, *supra* note 4 at 6.

¹¹ For example see Leader, *supra* note 4, chapter 11; P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (The Carswell Company Ltd: Toronto, 1980) at 32-33.

the rights and enhancing the power of workers.¹³ The right to bargain and the right to strike flow naturally from the right of workers to form associations. Unlike the liberal individualist perspective whereby the development of freedom of association is perceived as having been for the protection of individual liberty, the collective functional perspective postulates that the development of the freedom was to protect collective actions:

[i]t is important to bear in mind, therefore, that the reason why freedom of association was given protection in national and international law was not to protect individual interests, but rather to seek to secure a more equitable distribution of power within the working environment and beyond that, society as a whole. It would be both unfortunate and strange if the main substance of freedom of association, which was first introduced to allow workers to combine, were now to be seen in the right of individuals to an isolated existence.¹⁴

This dichotomy of views with respect to the principle of freedom of association is further reflected within interpretation of the principle of freedom of association by national and supra national bodies, when called upon to consider the meaning of an enactment of freedom of association in a national constitution or international treaty.

Freedom of Association in National and Supra National Jurisprudence

The principle of freedom of association is enacted in a range of international and national instruments. The construction of the freedom by relevant interpretative bodies as inclusive or exclusive of collective bargaining and the right to strike follows the individual/collective dichotomy outlined in the preceding discussion. In addition, the enactments of the freedom reflect an historic division within human rights jurisprudence between civil/political rights and social/economic rights.¹⁵

Rights can be divided into those traditionally considered to be negative, in the sense that no government intervention is required to ensure the existence of the right, and those which are positive, in the sense that government action is required to give

¹² K. D. Ewing, 'The Implications of *Wilson and Palmer*' (2003) 32 *Industrial Law Journal* 1 at 17.

¹³ Prondzynski, *supra* note 6 at 151.

¹⁴ *Ibid* at 232-233.

¹⁵ Social and economic rights are usually grouped with cultural rights. The exclusion of cultural rights from this thesis is not intended to suggest that they are less valuable or important than social and economic rights. Rather, cultural rights are excluded for the sake of brevity, because the right to strike could constitute either a social or an economic right, but is not a cultural right.

substance to the right.¹⁶ For example, in the UN context, civil and political rights, considered to be negative, were enshrined in the International Covenant on Civil and Political Rights (ICCPR), while economic and social rights, considered to be positive, requiring positive and usually financial action on the part of the State, were enacted in the ICESCR.¹⁷ There is continuing debate over the value of this division of human rights. In practical terms the economic/social rights have been afforded less priority in the international context than the civil/political rights. A timely example is the failure to develop a complaints protocol for the ICESCR, while a functional complaints protocol has been in place for the ICCPR since 1976.¹⁸ Recent commentary considers the continued division of rights as unjustified:

This subdivision can only be termed regrettable because, in truth, human rights consist of rights relating to both categories and no essential difference exists between them. Notwithstanding assertions to the contrary, this division has no logical or legal explanation but, in truth, resides on political disparities between States of different persuasions at the time of their negotiation and adoption.¹⁹

In general terms, where the principle of freedom of association is enacted in a rubric of civil/political rights, it is constructed from the individualist framework. Conversely, where the freedom is enacted within a rubric of economic/social rights, it is constructed from the collectivist framework. The study will now briefly consider the enactment and construction of the principle of freedom of association within a range of international and national instruments.²⁰

¹⁶ McFarlane, *supra* note 4 at 14.

¹⁷ For a detailed description of the history and development of the differentiation between the civil/political and economic/social rights see A. Eide and A. Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in A. Eide, C. Krause and A. Rosas, (eds.) *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff: Dordrecht, 1995), 15; D. Montgomery, 'Labor Rights and Human Rights: A Historical Perspective' in L. Compa and S. Diamond, (eds.) *Human Rights, Labor Rights and International Trade* (University of Pennsylvania Press: Philadelphia, 1996), 13.

¹⁸ For further discussion of the complaints protocol under the ICCPR see chapter 2.

¹⁹ N. Valticos, 'International Labour Standards and Human Rights: Approaching the Year 2000' (1998) 137 *International Labour Review* 135 at 148.

²⁰ The following discussion will examine enactments of the principle of freedom of association in a range of instruments. The examination is not intended to be exhaustive but demonstrative of the approach taken by domestic and international interpretative bodies.

*The International Covenant on Civil and Political Rights (ICCPR); The International Covenant on Economic, Social and Cultural Rights (ICESCR)*²¹

The ICCPR and the ICESCR, along with the *Universal Declaration of Human Rights* (UDHR) constitute the international code of human rights. While the UDHR is not binding in international law, the ICCPR and ICESCR represent the enforceable enactment of the principles set out within the UDHR. Those rights considered civil/political rights are enacted within the ICCPR, whereas economic/social rights are enacted within the ICESCR. The principle of freedom of association is enacted in both Covenants.²²

Article 22 of the ICCPR provides that “[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests”. The ICESCR contains a more extensive enactment of trade union rights. Article 8 provides that State Parties to the ICESCR undertake to ensure the right of everyone to form and join trade unions for the promotion and protection of their economic and social interests, for trade unions to function freely and for the right to strike.

In line with the individual/collective dichotomy and the civil/political versus social/economic split, jurisprudence with respect to these Conventions is divergent. Responsibility for interpretation of the ICCPR falls to the United Nations Human Rights Committee (UNHRC), which, in a non-binding determination, has indicated that the ICCPR principle of freedom of association does not extend to the right to strike.²³

Article 8, paragraph 1(d), of the [ICESCR] recognizes the right to strike Consequently, the fact that the [ICCPR] does not similarly provide expressly for the right to strike in article 22, paragraph 1, shows that this right is not

²¹ *The International Covenant on Civil and Political Rights (ICCPR)*, General Assembly Res 2200 21 UN GAOR, Supp (No 16) 52, UN Doc A/6316 (1966) (UNTS 14668); *The International Covenant on Economic, Social and Cultural Rights (ICESCR)*, General Assembly Res 2200A (XXI), 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966) (UNTS 14531).

²² For detailed discussion of the ICCPR and the ICESCR in the context of the international law relating to the right to strike see chapter 2.

²³ *J. B. et al v Canada*, Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, Twenty-Eighth session, UN Doc CCPR/C/28/D, Communication No. 118/1982 (hereafter referred to as ‘the *Alberta Union Case*’).

included in the scope of this article, while it enjoys protection under the procedures and mechanisms of the [ICESCR]....²⁴

The determination supports the proposition that the principle of freedom of association within the civil/political ICCPR has been interpreted from an individual rights perspective. While the right to join trade unions is mentioned within the expression of the right in Article 22, it has not been interpreted as an enactment of a workers' right. Rather, the inclusion of Article 8 within the more 'worker' orientated ICESCR provides the expression of the principle of freedom of association extending beyond a mere right to associate. Here, workers are provided with the right to form and join trade unions to protect their occupational interests and an express right to strike.²⁵

The principle of freedom of association encompassing, as it does, both an individual and collective element, is not easily classified in either of the two traditional human rights divisions. The ongoing differentiation of treatment of the principle where it is expressed in Covenants containing different 'types' of human rights is regrettable and causes unwarranted confusion over the content of the principle of freedom of association.

*The European Convention on Human Rights and Fundamental Freedoms (ECHR);
The European Social Charter (ESC)*²⁶

The enactment of the principle of freedom of association within the ECHR and the ESC is a further manifestation of the division of human rights. Civil/political rights are enacted within the ECHR, while social/economic rights are enacted within the

²⁴ Ibid, para 6.4.

²⁵ D. Beetham, 'What Future for Economic and Social Rights?' in D. Beetham, (ed.) *Politics and Human Rights* (Blackwell: Cambridge, 1995), 41. Beetham explicitly draws a connection between the ICCPR and ICESCR enactments of freedom of association, arguing that the ICESCR enactment is "a special case of the general right of association protected under the ICCPR", at 50.

²⁶ The Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, Council of Europe, ETS No. 5; The European Social Charter, Turin, 18.X.1961, Council of Europe, ETS No. 35. For a recent discussion of the principle of freedom of association and the right to strike within European Law, see: P. Germanotta and T. Novitz, 'Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action' (2002) 18 *International Journal of Comparative Labour Law and Industrial Relations* 67; T. Novitz, *International and European Protection of the Right to Strike* (Oxford University Press: Oxford, 2003).

ESC.²⁷ Further entrenching this division, the supervisory bodies for the two instruments are different. The European Court of Human Rights supervises the ECHR while a Committee of Experts is responsible for the ESC.

The principle of freedom of association is enacted in Article 11 of the ECHR: “[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and join trade unions for the protection of his interests”.²⁸ The ESC contains a more extensive enactment of workers’ rights in Articles 5 and 6, setting out the right to organise, the right to bargain collectively and the right to strike. Jurisprudence with respect to the provisions of the ECHR further demonstrates the dichotomy under discussion.

In a series of cases during the 1970s the European Court of Human Rights considered the scope of Article 11 of the ECHR and the question of whether or not it extends beyond a simple guarantee of association.²⁹ The court adopted an individualist perspective, while also recognising that the freedom to associate achieves little without a concomitant right to act in association. The court determinations sit between two extremes, holding that trade unions under Article 11 must have the right to represent the interests of their members, but that Article 11 does not prescribe the means to achieve this.³⁰ The court left this matter to the discretion of each individual State. Noting that collective bargaining and strike action are means by which a trade union could be enabled to represent the interests of their members, the court stated that they are not the only means and are therefore not protected under Article 11.³¹ Provided that a State has provided a mechanism for unions to represent the interests of their members, then it will be in compliance with Article 11.

²⁷ G. S. Morris, ‘Freedom of Association and the Interests of the State’ in K. Ewing, C. Gearty and B. Hepple, (eds.) *Human Rights and Labour Law: Essays for Paul O’Higgins* (Kluwer Law and Taxation Publishers: Deventer, 1994), 29 at 31–33.

²⁸ For discussion of Article 11 see D. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworths: London, 1995) at chapter 12.

²⁹ These determinations of the European Court of Human Rights were *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578; *Schmidt and Dahlstrom v Sweden* (1975) 1 EHRR 637 and *Swedish Engine Drivers’ Union v Sweden* (1975) 1 EHRR 617. For a detailed discussion of these cases see M. Forde, ‘The European Convention on Human Rights and Labor Law’ (1983) 31 *American Journal of Comparative Law* 301; J. Hendy, ‘The Human Rights Act, Article 11 and the Right to Strike’ (1998) 5 *European Human Rights Law Review* 582.

³⁰ *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578; [1975] ECHR 2, at paras 38 and 39.

This construction of Article 11 in regard to industrial association contrasts with the approach of the court to political association. In three complaints determined in 1998, the Court considered that Article 11 does extend to the protection of political association.³² However, unlike the case of association for industrial purposes, whereby regulation of the means of pursuing the interests of the association is left to each individual State, in the case of political affiliation the means of pursuing political association must be left to the association. In the words of Cullen, the “margin of State appreciation”, or the extent to which the State is left to determine the boundaries in which the freedom may be exercised, is much narrower for political association than for industrial association:

The Court of Human Rights, whether consciously or not, is making a clear distinction in the level of review it applies to different types of freedom of association case. While subjecting restrictions on political freedom of association to strict scrutiny and limiting the State’s margin of appreciation, the Court of Human Rights has affirmed a broad margin of appreciation in the organization of employment matters.³³

It may be possible to explain this differentiation of application through the traditional view of political association as a genuine civil/political concern while trade union association is generally considered to occupy the realm of economic/social rights. Therefore, the approach taken to political association is consistent with the approach that industrial association is considered to be more appropriately protected under economic/social instruments.

Despite the trend in the earlier cases, a recent determination has demonstrated a thaw in the approach of the court to Article 11.³⁴ The determination reaffirmed that Article 11 does not extend to a right to collective bargaining or a right to strike.³⁵ However, the court held that trade union members should not be prevented from engaging their trade unions to represent their interests in an attempt to regulate their relations with

³¹ *Schmidt and Dahlstrom v Sweden* (1975) 1 EHRR 637; [1976] ECHR 1 at paras 34 and 36.

³² *United Communist Party of Turkey v Turkey* (1998) 26 EHRR 121; *Sidiropoulos v Greece* (1998) BHRC 500; *The Socialist Party v Turkey* (1998) 27 EHRR 51. For discussion of the cases see: H. Cullen, ‘Freedom of Association as a Political Right’ (1999) 24 *European Law Review* 30.

³³ Cullen, *supra* note 32 at 30.

³⁴ *Wilson and the National Union of Journalists, Palmer, Wyeth and National Union of Rail, Maritime and Transport Workers, Doolan and others v United Kingdom* [2002] IRLR 128; ECHR 547; for discussion of this determination see Ewing, *supra* note 12.

their employer.³⁶ Ewing concludes that the right to strike has a “twilight” status under Article 11, given that it is not protected, but it is a means by which trade unions can represent the interests of their members.³⁷ The capacity of Article 11 to encompass collective bargaining and the right to strike will ultimately come down to where the European Court of Human Rights is prepared to set the margins of State appreciation of the industrial freedom of association at any particular time.

The right to strike and more specific worker orientated elements of the principle of freedom of association are contained within the ESC. Of particular relevance is Article 6, which regulates the right to bargain collectively and includes “the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into”.³⁸ This broader expression of the principle of freedom of association, demonstrates that a functional view of freedom of association is taken when freedom of association is enacted within a social/economic rights instrument.

As noted earlier, different bodies supervise these two European instruments.

Wedderburn considers that this assists in explaining the individual rights approach

³⁵ *Wilson and the National Union of Journalists*, para 42 and 44.

³⁶ *Ibid*, para 46.

³⁷ Ewing, *supra* note 12 at 18.

³⁸ Articles 5 and 6 of the ESC provide:

Article 5: The right to organise:

With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organizations for the protection of their economic and social interests and to join those organizations, the Contracting Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations.

Article 6: The right to bargain collectively:

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake:

1. to promote joint consultation between workers and employers;
 2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
 3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;
- and recognise:

adopted by the European Court of Human Rights in Article 11 cases.³⁹ He argues that the ESC represents a supplementation of the rights contained within the ECHR but as the European Court of Human Rights examines the ECHR independently of the ESC, its view is skewed to an individual construction of those rights.⁴⁰ The individualist focus of the court has also been noted by Novitz, in the context of commenting on a case relating to the question of whether or not Article 11 encompasses the negative freedom of association.⁴¹ Novitz concludes that in its interpretation of Article 11 the court has been too concerned with the rights of the individual over collective interests.⁴² Determinations concerning the ECHR have maintained the dichotomy under discussion where civil/political rights are interpreted through the prism of individual rights and economic/social rights are interpreted through the prism of collective interests.

International Labour Organization

The ILO does not apply the civil/political versus economic/social division to the enactment of standards. Preferring the terms 'social justice' and more recently 'human rights', the ILO does not categorise rights in the fashion adopted in other human rights instruments.⁴³

The principle of freedom of association is firmly entrenched in ILO instruments, principally the Constitution of the ILO and the Freedom of Association Conventions. ILO bodies construct the principle of freedom of association in a functional manner wherein the right to strike operates as an implicit facet of freedom of association.

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4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

³⁹ Lord Wedderburn, *Employment Rights in Britain and Europe: Selected Papers in Labour Law* (Lawrence and Wishart: London, 1991), in particular chapter 6: 'Freedom of Association or the Right to Organise? The Common Law and International Sources'.

⁴⁰ Ibid at 142-143.

⁴¹ T. Novitz, 'Negative Freedom of Association: *Gustafsson v Sweden*' (1997) 26 *Industrial Law Journal* 79.

⁴² Ibid at 87.

⁴³ L. Swepston, 'The International Labour Organization and Human Rights Access to the ILO' in G. Alfredsson, (ed.) *International Human Rights Monitoring Mechanisms - Essays in Honour of Jakob Th. Moller* (Kluwer Law International: The Hague, 2001), 485 at 486; H. Bartolomei de la Cruz, G. von Potobsky and L. Swepston, *The International Labor Organization: The International Standards System and Basic Human Rights* (Westview Press: Boulder, 1996) at 127. For historical accounts of the approach of the ILO see, for example: C. W. Jenks, *Human Rights and International Labour Standards*

The ILO bodies adopt a three dimensional interpretative approach to the principle of freedom of association.⁴⁴ Ben-Israel notes that for the ILO, freedom of association is constructed within the context of providing a counterweight to the power of employers, ensuring reciprocity in labour relations.⁴⁵ If it is accepted that labour relations require reciprocity, it is not possible to view freedom of association from a single dimension involving only the right of individuals to associate together. Instead:

[t]he freedom to associate and to bargain collectively must be supplemented by an additional freedom, which is the freedom to strike. Hence freedom to strike is a complementary freedom of the freedom of association since both are meant to help in achieving a common goal which is to place the employer – employee relationship on an equal basis.⁴⁶

The ILO expression of the principle of freedom of association is the same as that used within the ESC and the ICESCR, which is the economic/social rights construction. Swepston notes that the approach of international bodies to freedom of association in the social/economic context is standardised and developed out of the approach of the ILO:

[i]nternational law is thus fairly clear and remarkably consistent on the question of freedom of association and protection of the right to organise and bargain collectively. It is also clear that all these provisions [ESC and ICESCR] emerge more or less directly from Convention 87.⁴⁷

The collective functional view of freedom of association has predominated within the ILO. However, ILO commentary with respect to freedom of association is not insensitive to the individualist view. While affirming the collectivist functional approach to freedom of association, ILO bodies make concessions to the individualist perspective by avoiding negative pronouncements about individual rights within the context of freedom of association. In line with one of the three dimensions of freedom of association, the right of individuals to determine who they will associate with, ILO

(Stevens and Sons: London, 1960); C. W. Jenks, *Social Justice in the Law of Nations* (Oxford University Press: London, 1970); Valticos, *supra* note 19.

⁴⁴ See discussion of the three dimensional approach above at 25-27.

⁴⁵ Ben-Israel, *supra* note 1 at 25.

⁴⁶ *Ibid.*

⁴⁷ L. Swepston, 'Human Rights Law and Freedom of Association: Development through ILO Supervision' (1998) 137 *International Labour Review* 169 at 174.

bodies do not mandate compulsory union membership or closed shops.⁴⁸ Rather, they insist that collective bargaining should be voluntary and issues relating to compulsion in the context of the relationship of the individual to the trade union or with respect to the trade union and employer are left to the domestic policies and laws of Member States.⁴⁹ This flexibility demonstrates that the principle of freedom of association can embrace a collectivist functional view without mandating the overriding of the individualist perspective concerning the relationship of individuals, employers and trade unions. While some commentators from the collectivist functional viewpoint have perceived this as a weakening of collective power,⁵⁰ from a holistic point of view it represents a flexible approach that assists in accommodating seemingly divergent and inconsistent perspectives.

National Jurisdictions – Canada, England and Europe

The meaning of the principle of freedom of association has been explored within the domestic legal systems of a number of States. In Canada and some European States,⁵¹ the principle has been constitutionally entrenched, while in the United Kingdom, the principle has been considered in the context of the development of the common law and the constitutions of former colonies.

In Canada the principle of freedom of association is constitutionally entrenched in s 2(d) of the *Canadian Charter of Rights and Freedoms*.⁵² The meaning of the section

⁴⁸ See ILO General Survey, 1994, *supra* note 5 at para 100: “Systems which prohibit union security practices in order to guarantee the right not to join an organization, as well as systems which authorize such practices, are compatible with the Convention [87]”.

⁴⁹ See ILO General Survey, 1994, *supra* note 5 at para 265: “The two essential elements of Article 4 of Convention No. 98 refer to action by the public authorities to promote bargaining between the social partners and the **voluntary** nature of such bargaining”. (Emphasis added).

⁵⁰ Creighton argues that the ILO approach to trade union recognition, whereby compulsory trade union recognition for the purposes of collective bargaining is not mandated under the Freedom of Association Conventions, fundamentally weakens the ILO enactment of freedom of association: B. Creighton, ‘The ILO and Protection of Freedom of Association in the United Kingdom’ in K. Ewing, C. Gearty and B. Hepple, (eds.) *Human Rights and Labour Law: Essays for Paul O’Higgins* (Mansell Publishing Ltd: London, 1994), 1.

⁵¹ The right to strike is constitutionally entrenched in France, Greece, Italy, Portugal, Spain, Sweden and Switzerland: A. Jacobs, ‘The Law of Strikes and Lockouts’ in R. Blanpain and C. Engels, (eds.) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (7th ed., Kluwer Law International: The Hague, 2001), 585 at 586.

⁵² The *Canadian Charter of Rights and Freedoms* provides that:

2. Everyone has the following fundamental freedoms:

.....
(d) freedom of association.

was explored by the Canadian Supreme Court in the Collective Bargaining Trilogy in 1987.⁵³ These cases considered the scope of s 2(d) generally, while the decision in *Reference re Public Service Employee Relations Act* (the *Alberta Reference Case*)⁵⁴ looked specifically at the question of whether or not the principle of freedom of association encompasses the right to strike. The Court split 4:2 along individualist versus collectivist lines.

The majority determined that freedom of association within the Charter is a right belonging solely to the individual and represents the right of Canadian citizens to do in association those things already protected under the Charter. As collective bargaining and strike are not expressly protected by the Charter, the freedom to associate does not extend to those activities.⁵⁵ In dissent, Dickson CJ (Wilson J in agreement) argued that the principle of freedom of association protects group activities and invalidates legislation preventing activities on the grounds of their associational nature.⁵⁶ Dickson CJ argued that:

[i]f freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.⁵⁷

The principle of freedom of association as enshrined in the Constitution of Trinidad was considered by the Judicial Committee of the Privy Council in *Collymore v Attorney General*.⁵⁸ The court held that the right of freedom of association is a right to associate, not a right to pursue the objectives of association. Thus the court held that free collective bargaining and freedom to strike are not aspects of the principle of freedom of association in the Trinidad Constitution.

⁵³ *Reference re Public Service Employee Relations Act* [1987] 1 SCR 313 (Alberta Reference Case); *Public Service Alliance of Canada v Canada* [1987] 1 SCR 424 (Public Service Alliance Case); *Retail, Wholesale and Department Store Union v Saskatchewan* [1987] 1 SCR 460 (Saskatchewan Dairy Workers Case). For detailed discussion of the collective bargaining trilogy see: P. Cavalluzzo, 'Freedom of Association: Its Effect Upon Collective Bargaining and Trade Unions' (1988) Conference Proceedings: Labour Law under the Charter, *Queens Law Journal* 267; T. J. Christian and K. D. Ewing, 'Labouring under the Canadian Constitution' (1988) 17 *Industrial Law Journal* 73; L. Harmer, 'The Right to Strike: Charter Implications and Interpretations' (1989) 47 *University of Toronto Faculty of Law Review* 420; Wedderburn, supra note 39 at 146-9.

⁵⁴ *Alberta Reference Case*, supra note 53.

⁵⁵ Ibid, per Beetz, Le Dain and La Forest JJ at 390; McIntyre J at 407.

⁵⁶ Ibid at 367.

⁵⁷ Ibid at 362-363.

⁵⁸ [1970] AC 538 (PC). For discussion of this case see Wedderburn, supra note 39 at 145-6.

In the legal systems of Continental Europe the collectivist functional approach predominates. Lord Wedderburn notes that the “major systems of labour law on the continent tend to take a different view and recognise considerable collective content in the fundamental right to freedom of association”.⁵⁹ Wedderburn surveys West Germany, France, Sweden and Italy, the legal systems of all of which interpret freedom of association functionally to encompass considerable collective content.⁶⁰

Is the Right to Strike a Facet of the Principle of Freedom of Association?

This survey of the philosophical debate and jurisprudence on the scope of the principle of freedom of association has demonstrated that there is no one universally accepted and applied construction of freedom of association. Individual libertarians argue that the right to associate lends no greater rights to an association than the rights possessed by the individuals of that group. Functional collectivists see freedom of association as devoid of meaning when separated from the ability to pursue collective interests. In the words of Lord Wedderburn, proponents of the collective perspective consider that the individualist interpretation risks “reducing freedom of association to a mere freedom of assembly; a right to meet together without anything more”.⁶¹

A further theme within this survey is the division of human rights into the civil/political and social/economic categories. In many of the instances considered, the principle of freedom of association was construed in an individualist manner when associated with civil/political rights and only from a collectivist ‘worker’ perspective when placed in a rubric of economic/social rights. This emphasises the historical sidelining of workers’ rights and the failure of mainstream human rights theorists to overcome the outdated civil/political versus economic/social divide, and the perception that workers’ rights do not constitute true human rights.⁶² Leary notes that

⁵⁹ Wedderburn, *supra* note 39 at 149.

⁶⁰ The constitutions of these countries (except the then *West Germany*) include an express right to strike. However, Wedderburn demonstrates that the inclusion of an express right to strike has not prevented an expansive interpretation of the principle of freedom of association extending to the activities of trade unions in any of these States: Wedderburn, *supra* note 39 at 149-150.

⁶¹ Wedderburn *supra* note 6 at 16-17.

⁶² V. Leary, ‘The Paradox of Workers Rights as Human Rights’ in L. Compa and S. Diamond, (eds.) *Human Rights, Labor Rights and International Trade* (University of Pennsylvania Press: Philadelphia, 1996), 22; ‘Introduction: Labour Rights, Human Rights’ (1998) 137 *International Labour Review* 127.

this division is regrettable and “the human rights movement and the labour movement run on tracks that are sometimes parallel and rarely meet”.⁶³

The ILO has consistently dismissed these dichotomies, asserting the unity of rights regardless of the labels attached to them. The approach of the ILO in this area is a neglected, but extremely important and holistic approach to human rights. The centrality of workers’ rights to the human rights context cannot be overstated:

United Nations human rights activities have attracted widespread interest: less attention has been given to the International Labour Organization and questions relating to labour and human rights. Yet, the extent to which the rights of workers are protected provides a touchstone for evaluating a nation’s respect for human rights.⁶⁴

This thesis suggests that the right to strike has always constituted a legitimate component of the principle of freedom of association when the freedom is viewed through a prism of economic/social rights. This is reflected in the inclusion of an express statement of the right within the ICESCR and the ESC. Accordingly, this approach to freedom of association is valid, appropriate and binding on Australia (via the ICESCR and ILO instruments). The challenge for the future is to remove the false dichotomy between civil/political rights and economic/social rights, enabling the principle of freedom of association to be approached as a basic human right encompassing both the concept of individual rights and the three dimensional functional perspective⁶⁵ needed to ensure workers are able to organise in order to counterbalance the power of employers. It remains unclear where the concept of disassociation would fit within this model, however that is a matter beyond the scope of this thesis.⁶⁶ The functional construction of the principle of freedom of association provides a balanced, integrated approach capable of embracing both individual and collective views.

⁶³ Leary, *supra* note 62 at 22.

⁶⁴ V. Leary, ‘Lessons from the Experience of the International Labour Organization’ in P. Alston, (ed.) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press: Oxford, 1992), 580 at 583.

⁶⁵ See discussion above at 25-27.

⁶⁶ MacDermott notes that it remains unclear whether or not international instruments require the recognition and protection of the negative right of association. ILO bodies have consistently viewed this as an issue within the purview of Member States: T. MacDermott, ‘Labour Law and Human

Right to Strike or Freedom to Strike?

A final issue to consider in this discussion is the debate on the question of whether or not the ability to strike should be construed as a right or a freedom. Should we, as Ben-Israel does, refer to a 'freedom' to strike or should we refer to a 'right' to strike and does it make any practical difference?

The difference between recognising the ability to strike as a right or a freedom is considered by Kahn-Freund and Hepple in their study of the causes of, and justifications for, strike behaviour.⁶⁷ In terms echoing Hohfeld's classic analytical framework, they note that freedoms tend to be expressed in terms of immunities whereby activities covered by a freedom are immune from State interference. Rights are supported by a correlative duty, thus requiring a positive act, a guarantee of action, rather than the mere freedom to act unimpeded.⁶⁸

There exists within the literature a clear distinction between rights and freedoms. The philosophical distinction does not have direct practical consequences for this thesis. The examination of Australian law will demonstrate that domestically there is a complex web of overlapping rules (permissions and prohibitions; privileges and immunities), which allow scope for strike action in some circumstances but not in others. It is difficult to conceive of strike in the Australian context from either perspective in toto.

In this thesis, the right to strike is viewed as a dimension of the principle of freedom of association. In consequence, fulfilment of the right flows from the functional collective construction of freedom of association. Therefore, the right versus freedom debate is unhelpful from this perspective. The thesis adopts the view of Weiler, who contends that the ability to strike is not an inherent or intrinsic freedom or right, rather it is necessary from the functional view of the fundamental principle of freedom of

Rights' in D. Kinley, (ed.) *Human Rights in Australian Law: Principles, Practice and Potential* (Federation Press: Sydney, 1998), 194 at 206-207.

⁶⁷ Kahn-Freund and Hepple, *supra* note 4 at 9. Ben-Israel also canvasses the debate in R. Ben-Israel, 'Introduction to Strikes and Lock-outs: a Comparative Perspective' in R. Blanpain, (ed.) *Strikes and Lock-Outs in Industrialised Market Economies* (Kluwer Law and Taxation Publishers: Deventer, 1994), 1 at 8-10.

⁶⁸ *Ibid.*

association.⁶⁹ Therefore, the proper focus is not on whether the ability to strike constitutes a right or a freedom, but rather the extent to which a legal system allows strikes to occur unimpeded in order to fulfil their functional role as a facet of freedom of association. However, the phrase “right to strike” is the common usage, and it is used in this thesis in the non-technical sense, that is, free of the philosophical baggage.

Conclusion

This chapter has examined the issues surrounding the international recognition of the right to strike. The discussion illustrated a number of key debates and attempted to locate a commonality of approach within divergent perspectives.

This chapter has demonstrated that a unified approach to the right to strike exists within international law where the right to strike is constructed as a facet of the principle of freedom of association from an economic/social rights perspective. This is the lowest common denominator unifying the approaches taken under different international instruments and national constitutions. The ILO, in particular, adopts an approach that transcends this common base through rejection of the economic/social versus civil/political human rights division, an approach which is in keeping with the move away from the division in human rights more generally. It is argued in this chapter that the ILO approach to freedom of association and the right to strike is capable of being accommodated either within a unified vision of human rights or within a civil/political construction of human rights, provided that the rights of the individual are respected in order to accommodate the liberal perspective.

This chapter has examined the legal basis in international law for the recognition of the right to strike. The following chapters (2-3) will explore the precise scope and content of the right to strike in international law, building upon this theoretical foundation.

⁶⁹ Weiler, *supra* note 11 at 66-68.

Chapter Two

The Right to Strike in United Nations Instruments

Introduction

There are three United Nations (UN) instruments directly relevant to Australia's international obligation to implement a right to strike. These are the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which are collectively known as the International Bill of Rights.¹ This chapter will survey these UN instruments and establish the basis of the obligation expressed therein to recognise and implement the right to strike.

Universal Declaration of Human Rights (UDHR)²

The principle of freedom of association is expressed in Article 20 of the UDHR:³

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

The UDHR is not a convention or treaty, but a declaration made by the General Assembly of the UN. The Declaration acts as a general guide and "source of

¹ For an overview and critical assessment of the United Nations (UN) Human Rights regime see: P. Alston, 'Appraising the United Nations Human Rights Regime' in P. Alston, (ed.) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press: Oxford, 1992), 1. In addition to these Instruments, Australia is party to a number of other UN Conventions which have indirect relevance to the obligation to provide a right to strike: The International Convention on the Rights of the Child (UNTS 27531), The International Convention on the Elimination of all Forms of Discrimination against Women (UNTS 20378), and the International Convention on the Elimination of All Forms of Racial Discrimination (UNTS 9464) all prevent the denial of fundamental rights and freedoms on the grounds of age, race or gender. For example, Article 5(e)(ii) of the Convention on the Elimination of all forms of Racial Discrimination provides that "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights Economic, social and cultural rights, in particular: ... The right to form and join trade unions".

² The *Universal Declaration of Human Rights* (UDHR) was adopted by the General Assembly of the UN on 10 December, 1948: General Assembly Res 2174 (III), UN Doc A/810, (1948). For detailed discussion of the UDHR see G. Alfredsson and A. Eide, (eds.) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff Publishers: The Hague, 1999).

³ For detailed discussion of Article 20 see M. Scheinin, 'Article 20' in G. Alfredsson and A. Eide, (eds.) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff Publishers: The Hague, 1999) at 417.

inspiration” for the passage of other international human rights instruments.⁴ While not a direct source of binding international law, the Declaration “remains the primary source of global human rights standards”, and many of its provisions constitute customary international law.⁵

The principle of freedom of association expressed in the UDHR has been further developed within the UN’s Human Rights Conventions, specifically the ICCPR and the ICESCR.

International Covenant on Civil and Political Rights (ICCPR)⁶

The principle of freedom of association is enacted in Article 22(1) of the ICCPR:

[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.⁷

The implementation of the ICCPR is monitored by the UN Human Rights Committee (UNHRC), established pursuant to ICCPR Article 28. It consists of 18 members elected by State parties to the ICCPR, serving in a personal capacity.⁸ Article 40 of the ICCPR requires State parties to make regular reports to the UNHRC on progress

⁴ A. Hegarty and S. Leonard, (eds.) *Human Rights: Agenda for the 21st Century* (Cavendish Publishing Ltd: London, 1999) at 6.

⁵ H. Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1996) 25 *Georgia Journal of International and Comparative Law* 287 at 289. Hannum notes that the right to form and join trade unions could be considered to constitute a norm of customary international law although the exact content of the right has not yet been firmly settled. As the following discussion will demonstrate, the question of whether or not the right to form and join trade unions within the *International Covenant on Civil and Political Rights* contains a right to strike is unsettled. Further, the High Court of Australia (for the purposes of domestic law) considers that there is no customary international law providing a right to strike: *Victoria v Commonwealth* (1996) 187 CLR 416 at 545 where the majority judgment of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ found that there was no basis on the material presented to the court for the existence of a right to strike in customary international law.

⁶ The *International Covenant on Civil and Political Rights* (ICCPR) entered into force on 23 March, 1976 and was ratified by Australia on 13 November, 1980: ICCPR, General Assembly Res 2200 21 UN GAOR, Supp (No 16) 52, UN Doc A/6316 (1966) (UNTS 14668). Ratification information sourced from Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, 9 December, 2002. Online, Available: <http://www.unhchr.ch/pdf/report.pdf>. For further discussion of the ICCPR see S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press: Oxford, 2000); D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon Press: Oxford, 1991), chapter 1.

⁷ For detailed discussion of Article 22 of the ICCPR see M. Nowak, *U.N. Covenant on Civil and Political Rights: CPCR Commentary* (N.P. Engel: Kehl am Rhein, 1993).

⁸ R. Piotrowicz and S. Kaye, *Human Rights in International and Australian Law* (Butterworths: Chatswood, 2000) at 36.

made to implement the Convention at the domestic level. Reports are due every five years, unless the UNHRC requests a report earlier.⁹ The UNHRC reviews information provided in State Reports and produces Concluding Observations with respect to the law and practice of each State.

Under the Optional Protocol to the ICCPR, the UNHRC may receive and consider communications from individuals alleging violations of any of the rights set forth in the ICCPR.¹⁰ Under Article 1 of the Optional Protocol, ratifying parties recognise the competence of the UNHRC to receive and consider communications from individuals subject to their domestic jurisdiction. Decisions of the UNHRC under the individual complaints procedure and statements made in General Comments or Concluding Observations are not formally binding under international law.¹¹ However, committee members of the International Law Association suggest that such determinations have considerable persuasive force on Member States and add to the development of substantial interpretive jurisprudence of the human rights instruments.¹²

The principle of freedom of association within the ICCPR is expressed as an enactment of a trade union freedom in a civil / political rights context. As such, the expression is limited in scope and does not include the right to strike. However, the UNHRC had cause to consider whether or not the principle of freedom of association expressed in Article 22(1) encompasses the right to strike in *J. B. et al v. Canada* (hereafter the '*Alberta Union Case*').¹³ On behalf of affected applicants, the Alberta

⁹ Article 40 of the ICCPR provides that:

- (1) The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights;
 - (a) Within one year of the entry into force of the present Covenant for the States Parties concerned;
 - (b) Thereafter whenever the Committee so requests.

¹⁰ Optional Protocol to the International Covenant on Civil and Political Rights; Adopted by UN General Assembly Resolution 2200A (XXI) GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 59, UN Doc. A/6316 (1966), 999 UNTS 302, entered into force March 23, 1976. For discussion of the Optional Protocol see McGoldrick, *supra* note 6, chapter 4. The Optional Protocol was acceded to by Australia on 25 September 1991. Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal Human Rights Treaties*, Geneva, 9 December, 2002.

¹¹ International Law Association, Committee on International Human Rights Law and Practice, *Interim Report on the Impact of the work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals*, 2002, New Delhi Conference at 12.

¹² *Ibid* at 15.

¹³ Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, Twenty-Eighth session, UN Doc. CCPR/C/28/D, Communication No.

Union of Public Employees challenged the *Public Service Employee Relations Act* 1977 (Alberta) which prohibited public employees from engaging in strike action. The Union argued that the Act contravened Article 22(1) because it prohibited the right to strike, guaranteed as a facet of the principle of freedom of association. In order to address the merits of the argument made by the Union, the UNHRC needed to establish, as a matter of jurisdiction, that it had competence to deal with the communication. Article 3 of the Optional Protocol provides that the UNHRC shall not consider any communication that is incompatible with the ICCPR.¹⁴ In this case, a primary jurisdictional matter was whether or not the absence of explicit protection of the right to strike within the ICCPR rendered the communication incompatible with the Convention and therefore inadmissible.

The majority of the UNHRC held that it did not have competence to hear the communication. The majority considered that the right to strike is not a facet of the principle of freedom of association guaranteed in Article 22. In reaching this determination, the majority referred to the explicit protection of the right to strike enacted within the ICESCR.¹⁵

The majority examined the drafting history of the ICCPR, comparing the provisions with the comparable provisions of the ICESCR. They determined that the explicit recognition of the right to strike within the ICESCR, expressed separately from the right to form and join trade unions, makes it clear that the right to strike cannot be considered as an implicit component of the right to form and join trade unions under the ICESCR or ICCPR.¹⁶ Consequently, the majority found that the lack of explicit recognition of the right to strike within the ICCPR demonstrates that the right was not

118/1982 (hereafter referred to as 'the *Alberta Union Case*'). For further discussion of this decision see V. A. Leary, 'The Paradox of Workers Rights as Human Rights' in L. Compa and S. Diamond, (eds.) *Human Rights, Labor Rights and International Trade* (University of Pennsylvania Press: Philadelphia, 1996), 22 at 34; K. D. Ewing, 'Freedom of Association and Trade Union Rights' in D. Harris and S. Joseph, (eds.) *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press: Oxford, 1995), 465 at 467-469; Nowak, *supra* note 7 at 390-393.

¹⁴ Article 3 of the Optional Protocol to the ICCPR states that:

The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.

¹⁵ The ICESCR, Article 8(1)(d) contains an express statement of the right to strike.

intended to be included within the scope of Article 22(1) and the right to form and join trade unions therein expressed.

A joint dissenting individual opinion was delivered by five members of the UNHRC.¹⁷ This opinion argued that Article 22(1) guarantees a broad right of freedom of association and the exercise of this right requires that some measure of concerted activities be allowed in order to ensure that the right of freedom of association serves its purpose. The opinion concluded that the communication from the Alberta Union of Public Employees was admissible because the right to strike was protected as a facet of freedom of association within Article 22(1).

The determination of the majority in the *Alberta Union Case* would appear to settle the question of whether the principle of freedom of association within the ICCPR implicitly protects the right to strike and has not yet been expressly overturned. However, it has been criticised on several grounds. Leary asserts that it is “unpersuasive”, suggesting that the credibility of the determination is undermined by the dissenting individual opinion, signed, by “five of the most respected members of the Committee”.¹⁸ Further, both McGoldrick and Nowak agree with the minority view that the question of whether the principle of freedom of association within Article 22(1) incorporates a right to strike is a question more appropriately determined on the merits rather than on the admissibility of the communication.¹⁹

The majority finding is based on a technical approach to the interpretation of the ICCPR, made entirely on an assessment of the travaux préparatoires and the wording of Article 8 of the ICESCR, rather than any functional evaluation of the meaning of the principle of freedom of association.²⁰ In contrast, the dissenting individual opinion considered the principle of freedom of association to represent a “broad right of

¹⁶ Article 8(1) of the ICESCR contains 4 sub-articles (a-d). Sub-articles (a-c) deal with trade union rights in general, whilst the right to strike is expressed in sub-article (d). See the subsequent discussion of the ICESCR right to strike.

¹⁷ Individual Opinion, Submitted by Ms. Rosalyn Higgins and Messrs. Rajsoom Lallah, Andreas Mavrommatis, Torkel Opsahl and S. Amos Wako; Appendix to the decision in *J. B. et al v Canada*, UN Doc CCPR/C/28/D, Communication No. 118/1982.

¹⁸ Leary, *supra* note 13 at 34. See also M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press: Oxford, 1995) at 278.

¹⁹ McGoldrick, *supra* note 6 at 166; Nowak, *supra* note 7 at 392.

²⁰ *Ibid*, para 6.3 – 6.4.

freedom of association”, the exercise of which “requires that some measure of concerted activities be allowed”.²¹ Nowak suggests that the minority opinion corresponds “more to the wording, object, purpose and historical background of the provisions” and that the majority decision “contributes to a complete undermining of [the] right”.²²

Furthermore, the finding of the majority does not pay adequate attention to the interpretation of the principle of freedom of association within ILO “quasi-jurisprudence”.²³ The finding notes that it accepts the interpretation of those treaties “as correct and just”, however each international treaty has a “life of its own” and must be interpreted accordingly.²⁴ This approach does not fully or adequately address the consequences of enshrining differing approaches to the principle of freedom of association under different international instruments.²⁵ It is also not consistent with the practice of other treaty bodies. For example, the Concluding Observations of the Committee on Economic, Social and Cultural Rights interpreting the ICESCR often make use of or reference to the principles established under the ILO freedom of association conventions.²⁶

The current status of the decision in the *Alberta Union Case* is unclear. As shown, the decision is open to criticism for defects within the reasoning. Further, pre 1990

²¹ Individual Opinion, *Alberta Union Case*, supra note 17 at para 3.

²² Nowak, supra note 7 at 392 and 393.

²³ For discussion of the nature of the commentary made by ILO bodies and its categorisation as “quasi-jurisprudence” see chapter 3 at 80-82.

²⁴ *Alberta Union Case*, supra note 13 at para 6.2.

²⁵ In contrast, the dissenting individual opinion took into account the difficulties of providing a different interpretation of freedom of association under the ICCPR than the approach prevailing in other international treaties. The dissenting opinion examined the ICESCR, arguing that the specific enumeration of rights within the ICESCR was not incompatible with the implication of the right to strike within the ICCPR. With respect to ILO determinations, the minority determination noted that “[w]e cannot see that a manner of exercising a right which has, under certain leading and widely ratified international instruments, been declared to be in principle lawful, should be declared to be incompatible with the Covenant on Civil and Political Rights”. Individual Opinion, *Alberta Union Case*, supra note 17 at para 8.

²⁶ For example, recent Concluding Observations relating to State Reports on the ICESCR of the United Nations Committee on Economic, Social and Cultural Rights with respect to Article 8(1)(d) have referred favourably to ILO Conventions. In a Concluding Observation relating to Australia (ICESCR, E/2001/22 (2000) 62 at para 394), the CESCR recommended that restrictions on the right to strike in essential services in Australia be limited “in accordance with ILO Convention No. 87”. A further example can be drawn from a Concluding Observation in relation to Japan (ICESCR, E/2002/22 (2001) 90 at para 627) where the CESCR recommended that Japan “[I]n line with the ILO, ... ensure the right of civil servants and public employees not working in essential services to organize strikes”.

determinations of the UNHRC have been widely criticised for the literalist and unreasoned approach generally adopted in interpreting the Convention.²⁷ However, the UNHRC has not reconsidered the determination, as Article 22 has not been the subject of a General Comment and the issue has not been raised and considered in the context of an individual communication.

The current approach of the Committee may be more sympathetic and the Concluding Observations of the UNHRC with respect to State Reports submitted under the ICCPR reporting mechanisms provide guidance. The discussion of State practice with respect to the principle of freedom of association enshrined in Article 22 suggests that the UNHRC has become more prepared to consider that Article 22 could protect the right to strike. In Concluding Observations concerning Germany made in 1996, the committee noted with concern the prohibition of strikes by German public servants: “[t]he Committee is concerned that there is an absolute ban on strikes by public servants who are not exercising authority in the name of the State and are not engaged in essential services which **may** violate Article 22 of the Covenant”.²⁸ This statement suggests that the Committee may consider restrictions upon the right to strike to be in violation of Article 22. This could only be correct if Article 22 encompassed a right to strike. These comments of the Committee correspond with the views of the ILO bodies relating to legitimate restrictions on strike action.

The specific enactment of the right to strike within the ICESCR may suggest that it is unnecessary to engage in such detailed consideration of the ICCPR. However, the issue is not merely academic. Controversy remains as to the proper status of the economic, social and cultural rights as human rights and therefore of any such rights contained within the ICESCR. While this thesis accepts that economic, social and cultural rights are properly considered to be human rights, a finding of an implicit right to strike within the ICCPR would ensure that the legitimacy of the right to strike is not challenged on such grounds. A consistent approach to the interpretation of the

²⁷ See ILA Report, *supra* note 11 at 9-10. The Interim Report cites a number of commentators with respect to the holdings of the UNHRC, noting in particular the comment of Opsahl (T. Opsahl, ‘The Human Rights Committee’ in P. Alston, (ed.) *The United Nations and Human Rights: A Critical Appraisal* (Clarendon Press: Oxford, 1992 at 427)) that up to the early 1990s “[t]he views are not reasoned in great detail”.

principle of freedom of association in international law would assist in maintaining the legitimacy of the interpretation adopted by the ILO organs within the ILO bodies. An additional reason relates to States, like the United States of America, that have ratified the ICCPR but have not ratified the ICESCR or the ILO freedom of association Conventions.²⁹ While it can be argued that the USA is subject to an international obligation to provide a right to strike through the Constitution of the ILO and the ILO Fundamental Declaration on Rights and Principles at work, it is not subject to any express statement of this right.³⁰ A strict adherence to the conclusions in the *Alberta Union Case* allows such States to avoid the obligation to provide a right to strike by only committing to the principle of freedom of association through Article 22. If the *Alberta Union Case* were to stand as the correct interpretative approach, the freedom of association principle within the ICCPR will continue to have limited functional meaning.

An approach which finds that the right to strike is protected by Article 22 of the ICCPR would be preferable to ensure that States that fall into this category are subjected to the broader principle of freedom of association encompassing collective bargaining and strike action. Further, such an approach would provide consistency in interpretation of the principle of freedom of association in international law and would avoid the civil/political – economic/social rights distinction.

Article 22(3)

A further factor to consider with respect to the interpretation of Article 22(1) is Article 22(3),

[n]othing in this article shall authorise States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which

²⁸ *Concluding Observations, United Nations Committee on Human Rights*, CCPR A/52/40 (1997), para. 188 (emphasis added).

²⁹ The United States of America became a signatory to the ICESCR on 5 October 1977. However, to date they have not ratified the ICESCR - Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, 9 December, 2002. Online, Available: <http://www.unhchr.ch/pdf/report.pdf>.

³⁰ Determinations of ILO bodies indicate that the obligation to respect the principle of freedom of association within the ILO Constitution and the 1998 Declaration of Fundamental Rights and Principles at work encompasses an obligation to guarantee a right to strike and is imposed on all ILO member States regardless of the non-ratification by those States of the freedom of association Conventions. See discussion in chapter three at 69-72.

would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

The significance of Article 22(3) in this context lies within the reference to ILO Convention 87: *The Freedom of Association and Protection of the Right to Organise Convention*, 1948. While not containing an express right to strike, ILO bodies have found that the principle of freedom of association protected by the Convention contains an implicit right to strike.³¹ Therefore, Article 22(3) raises the issue of whether the interpretation of Article 22(1) should reflect the interpretation of freedom of association adopted by the ILO in respect of Convention 87.

Nowak argues that the adoption of Article 22(3) was made for largely “cosmetic reasons” in order to stress that the UN had not overlooked the efforts of the ILO with respect to the principle of freedom of association.³² In consequence, the conventional approach to Article 22(3) has been to view it as insignificant, and not expansive of the obligations agreed to by a State that had ratified the ICCPR but not ILO Convention 87.³³

Ewing suggests that the presence of Article 22(3) could mean two different things. One interpretation could be that in order to comply with Article 22, ratifying States’ domestic law and practice must comply with ILO Convention 87.³⁴ This would necessitate the provision of a right to strike. Alternatively, Article 22(3) is only relevant to the limitations that may be imposed on the exercise of trade union rights protected by Article 22, as set out in Article 22(2), requiring such limitations to be consistent with ILO standards.³⁵ If Article 22(1) does not protect the right to strike, then the limitations in Article 22(2) would not be affected by ILO determinations on the right to strike, but only by those in the area of general trade union rights. The decision of the UNHRC in the *Alberta Union Case* would appear to support this

³¹ See discussion in chapter one at 34-36 and below in chapter three at 68-86.

³² Nowak, *supra* note 7 at 399.

³³ *Ibid* at 400.

³⁴ Ewing, *supra* note 13 at 482-483.

³⁵ Article 22(2) provides that “[n]o restrictions shall be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right”. For discussion see: Ewing, *supra* note 13 at 483.

interpretation of Article 22(3) although the determination did not consider the meaning of Article 22(3).

The more generous reading of the principle of freedom of association in Article 22(1) as reflected in the recent Concluding Observations of the UNHRC and the reference to ILO Convention 87 in Article 22(3) could provide the basis for holding that the principle of freedom of association protected by the ICCPR does protect the right to strike. Such an approach would assist in overcoming the difficulties identified with the majority decision in the *Alberta Union Case*, and would avoid an interpretation of Article 22(1) that left it with limited functional meaning. Further, it would provide a meaningful interpretation of Article 22(3). As Nowak suggests “[s]ince an express provision of a law or an international treaty is not to be assumed to be superfluous or meaningless”, such an interpretation is preferable.³⁶

International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁷

Operation of the ICESCR

The principle of freedom of association including an express statement of the right to strike is found in Article 8 of the ICESCR:³⁸

The States Parties to the present Covenant undertake to ensure,³⁹
.....

³⁶ Nowak, *supra* note 7 at 400.

³⁷ The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) entered into force on 3 January, 1976 and was ratified by Australia on 10 December 1975: ICESCR, General Assembly Res 2200A (XXI), 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966) (UNTS 14531). Ratification information sourced from Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, 8 February, 2002. Online, Available: <http://www.unhchr.ch/pdf/report.pdf>. For discussion of the ICESCR see Craven, *supra* note 18; P. Alston and G. Quinn, ‘The Nature and Scope of States Parties’ Obligations Under the International Covenant of Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156. For specific discussion of Article 8 of the ICESCR see C. Fenwick, ‘Minimum Obligations with Respect to Article 8 of the International Covenant on Economic, Social and Cultural Rights’, in A. Chapman and S. Russell, (eds.) *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia: Antwerp, 2002), 53.

³⁸ For detailed history of the drafting and adoption of Article 8 of the ICESCR see Craven, *supra* note 18 at 257 – 259; and R. Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer Law and Taxation Publishers: Deventer, 1988) at 72-83.

³⁹ Both Craven and Ben-Israel note that while Article 2(1) of the ICESCR provides that the rights under the Covenant are to be achieved *progressively*, the use of the word *ensure* in Article 8 indicates that Article 8 is to be implemented immediately and is not subject to progressive implementation; Craven, *supra* note 18 at 261-262; Ben-Israel, *supra* note 38 at 86.

- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

The UN Economic and Social Council (ECOSOC) is the body responsible for supervision of State party implementation and adherence to the ICESCR. ECOSOC established the Committee on Economic, Social and Cultural Rights (CESCR) to monitor State reporting requirements, produce Concluding Observations noting positive aspects of compliance, principal subjects of concern, and to make recommendations regarding future compliance.⁴⁰

Unlike the ICCPR, the ICESCR does not contain an individual (as opposed to State activated) complaint mechanism.⁴¹ Therefore, there are no determinations to assist with ascertaining the application of the Convention in a given situation. However, the Concluding Observations of the CESCR, surveying State law and practice, do provide guidance for the application of the Convention.⁴² While this source is not as useful as a complaint mechanism, Rosas and Scheinin suggest that the procedures of the CESCR are thorough enough to constitute a quasi-judicial or unofficial complaint process.⁴³ In order to clarify uncertainty with respect to the interpretation of the ICESCR for the purposes of ratifying States' reporting obligations, the CESCR authors General Comments.⁴⁴ However the Committee has not yet produced a General Comment with respect to Article 8. Due to the absence of jurisprudence establishing

⁴⁰ Provisions regarding reporting requirements and the obligations of ECOSOC (as carried out by the CESCR) are contained within Part IV of the ICESCR, Article 16 – 25. The CESCR was established under ECOSOC Resolution 1985/17, UNESCOR Supp (No.1), at 15, UN Doc. E/1985/85, (1985).

⁴¹ The United Nations is currently looking at a Draft Optional Protocol to the ICESCR, considered by the CESCR in 1996. The Draft Optional Protocol would incorporate a complaints procedure granting individuals or groups the right to submit communications to the CESCR concerning non-compliance with the Covenant. See Commission on Human Rights, Status of the International Covenants on Human Rights, *Draft Optional protocol to the International Covenant on Economic, Social and Cultural Rights, Note by the Secretary General*, United Nations Document E/CN.4/1997/105, 18 December 1996. For discussion of the development until 2000 of the Draft Optional Protocol see A. Byrnes, 'An Effective Complaints Procedure in the Context of International Human Rights Law' in A. Bayefsky, (ed.) *The UN Human Rights Treaty System in the 21st Century* (Kluwer International: London, 2000), 139 at 160-162.

⁴² For a general discussion of the supervision, implementation and complaint mechanisms with respect to the economic, social and cultural rights in international law see A. Rosas and M. Scheinin, 'Implementation Mechanisms and Remedies' in A. Eide, C. Krause and A. Rosas, (eds.) *Economic, Social and Cultural Rights: A Text Book* (Martinus Nijhoff Publishers: London, 1995), 355.

⁴³ Ibid at 357.

⁴⁴ General Comments of the Committee on Economic, Social and Cultural Rights have been consolidated by the United Nations: *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, United Nations Document: HRI/GEN/1/Rev.5, 26 April, 2001.

the boundaries and scope of the right to strike as enumerated within Article 8, resort must be had to the express wording of the Convention in accordance with the *Vienna Convention on the Law of Treaties*,⁴⁵ (hereafter the '*Vienna Convention*'), ICESCR State party reports, Concluding Observations of the CESCR and academic commentary.⁴⁶

The main issues that arise with respect to the interpretation of the ICESCR right to strike relate to the relationship between the express right to strike in Article 8(1)(d) and the general trade union rights elaborated in other subparagraphs of Article 8(1).⁴⁷ The following discussion will canvass these issues to clarify the extent of the right set out in the ICESCR.

Article 8(1)(d)

Article 8(1)(d) provides that the right to strike is to be ensured '*provided that it is exercised in conformity with the laws of the particular country*'. The expression of the right is not further elaborated within the text of the ICESCR and the scope of the right remains substantially undefined.⁴⁸

In his study of the ICESCR, Craven analyses CESCR reporting guidelines and Concluding Observations concerning Article 8(1)(d) to ascertain the scope of the right to strike.⁴⁹ Craven's discussion is necessarily circumspect, providing tentative conclusions at best, but discerns the following trends within CESCR commentary:

- protection extends beyond the trade union to the individual against dismissal for strike (as the right is expressed as an individual right);

⁴⁵ Article 31-33 of the Vienna Convention on the Law of Treaties reflect the customary rules of international law relating to interpretation of treaties. See Alston and Quinn, *supra* note 37 at 160 for articulation of these rules.

⁴⁶ See ILA Report, *supra* note 11 at 4.

⁴⁷ Articles 8(1)(a) – (c) set out general trade union rights as an expression of the principle of freedom of association relating to the right to form and join trade unions.

⁴⁸ The final draft of the ICESCR was debated within the UN Commission on Human Rights. Ben-Israel argues that the failure of the Commission to define the boundaries of the right to strike resulted from a divergence of opinion on the consequences of definition, exacerbated by Cold War tensions. Ben-Israel notes that, in general, socialist countries advocated an expansive definition of the right to strike in order to safeguard the full expression of the right. However, Western nations advocated caution, noting that the right to strike was protected as an element of collective bargaining, and further sought to ensure the enactment of suitable limitations on the exercise of the right to accommodate national interests. Ben-Israel, *supra* note 38 at 72-79.

⁴⁹ Craven *supra* note 18 at 278.

- some members of the CESCER consider the right to strike operates as a facet of the principle of freedom of association and an essential element of collective bargaining;
- the CESCER considers the entrenchment of the right in legislation to constitute a priority for ratifying States; and
- such legislation should be clear, precise and no impediment to the exercise of the right.⁵⁰

However, Craven's conclusions only encompass CESCER commentary until 1995. Concluding Observations made since 1995 reveal willingness on the part of the CESCER to accept and apply quasi jurisprudence developed by ILO bodies on the boundaries of the right to strike, particularly with respect to restriction of strikes in essential services.⁵¹ At least three recent Concluding Observations have noted that restrictions on strikes in the States concerned have exceeded the restrictions permissible under Article 8(2) which allow lawful restrictions on the right to strike for the police or for those involved in the administration of the State. To determine the meaning of "workers involved in the administration of the State", the CESCER has referred to the principle of freedom of association within ILO Conventions 87 and 98.⁵² In 2001, the CESCER concluded that Japanese teachers were not involved in the administration of the State, referring to UNHRC and ILO commentary expressly excluding teachers from this category.⁵³ In addition to cases where the CESCER draws direct parallels with the ILO, other Concluding Observations include CESCER

⁵⁰ Ibid at 278-281.

⁵¹ For further discussion of the willingness of the CESCER to consider ILO jurisprudence in the area of strikes and essential services see Fenwick, *supra* note 37, at 67-68.

⁵² Convention 98: *The Right to Organise and Collective Bargaining Convention*, 1949. See *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany*, 24/09/2001, E/C.12/1/Add.68, Committee on Economic, Social and Cultural Rights, 26th Session, para 22; *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Benin*, 05/06/2002, E/C.12/1/Add.78, Committee on Economic, Social and Cultural rights, 28th Session, para 35; *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Japan*, 24/09/2001; E/C.12/1/Add.67, Committee on Economic, Social and Cultural Rights, 26th Session, para 21.

⁵³ *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Japan*, 24/09/2001; E/C.12/1/Add.67, Committee on Economic, Social and Cultural Rights, 26th Session, para 21. The observation also canvassed whether or not the judiciary were considered to be exercising the authority of the State. While the Observation concluded that they were not exercising the authority of the State, ILO quasi-jurisprudence suggests that members of the judiciary are engaged in the administration of the State. For further discussion of the view of ILO bodies on this issue see chapter 3 at 100-101.

commentary that is in line with ILO quasi jurisprudence with respect to the scope of permissible restrictions on the right to strike.

The CESCR concluding observation relating to Bolivia in 2001 commented adversely on the Bolivian *General Labour Act* which requires endorsement of a strike by three quarters of eligible workers to undertake a legal strike.⁵⁴ The CESCR observed that this was excessive and constituted “a restriction on the right provided for in article 8(1)(d) of the Convention”.⁵⁵ Further, the CESCR has made repeated comments with respect to the United Kingdom of Great Britain and Northern Ireland. The CESCR stated in 1997, and reiterated in 2002, that the failure of Great Britain and Northern Ireland to incorporate the right to strike into domestic law is a breach of Article 8(1)(d). Further, the position in the British common law whereby strike action constitutes a breach of contract giving rise to a right to dismiss the employee “is not consistent with protection of the right to strike”.⁵⁶ The CESCR also stated that “[t]he Committee does not find satisfactory the proposal to enable employees who go on strike to have a remedy for unfair dismissal. Employees participating in a lawful strike should not ipso facto be regarded as having committed a breach of the employment contract”.⁵⁷ This observation by the CESCR constitutes a strong statement concerning not only the right to strike, but also the **form** that the provision of that right should take. This indicates a willingness by the CESCR to move away from an interpretation of the right enacted in Article 8(1)(d) that permits a wide variation of State practice, to one that embraces a narrower conception of permissible restrictions on the right, an approach which is in line with that adopted by the ILO.⁵⁸

⁵⁴ *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Observation: Bolivia, Convention 87, 73rd Session, 2002.

⁵⁵ *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, Bolivia, 21/05/2001; E/C.12/1/Add.60, Committee on Economic, Social and Cultural Rights, 28th Session, para 18. The view of the implementation of the right to strike in Bolivia is shared by the Committee of Experts on the Application of Conventions and Recommendations of the ILO with respect to the implementation of the right to strike. The CEACR notes “with regret” the imposition of the ¾ requirement for the declaration of a legal strike: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Observation: Bolivia, Convention 87, 73rd Session, 2002, para B. III.

⁵⁶ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland*, 04/12/97, E/C.12/1/Add.19, Committee on Economic, Social and Cultural Rights, para 11; Reiterated in 2002 – 05/05/2002, E/C.12/1/Add.79, 28th Session, para 34.

⁵⁷ *Ibid.*

⁵⁸ The view of the CESCR on strike as breach of contract is consistent with the views of the ILO Committee on Freedom of Association (CFA) that “the [CFA] cannot view with equanimity a set of

The willingness of the CESCER to refer to ILO quasi jurisprudence and to engage with the form that the provision of the right to strike should take suggests that Article 8(1)(d) should become increasingly relevant and more closely resemble ILO standards. The observations also suggest that it is permissible to refer to ILO jurisprudence for assistance in ascertaining the scope of the right within Article 8(1)(d) of the ICESCR.

The limitation clause in Article 8(1)(d)

Article 8(1)(d) subjects the exercise of the right to strike to the domestic laws of the ratifying country. The difficulty posed is to determine permissible restrictions on strike action before the provision of the right under Article 8(1)(d) is impaired.

The nature of the limitation contained within Article 8(1)(d) needs to be read within the context in which it appears and the general approach to the interpretation of treaties as set down within the *Vienna Convention*. Article 31(1) of the *Vienna Convention* provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. This suggests that Article 8(1)(d) should not be given a restrictive interpretation whereby any domestic law restricting the right to strike would be valid. Instead, the provision must be read in good faith, that is, provisions restricting the right to strike should not detract from the object and purpose of the Convention. Therefore, State parties are under an obligation to guarantee a right to strike and national laws affecting the exercise of the right should not be so restrictive that the right is stripped of meaning or content or that the existence of the right is vitiated.⁵⁹ Within this context, academic observations suggest that the limitation provision within Article 8(1)(d) should be interpreted as permitting procedural limitations upon the exercise of the right to strike, rather than allowing substantive limitations to affect the operation of the right.⁶⁰

legal rules which: (i) appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein”. *Complaint Against the Government of Australia presented by the International Federation of Airline Pilots Associations (IFALPA)*, Document Vol. LXXIV, 1991, Series B, No. 1, Report 277, Case 1511, para 236.

⁵⁹ Ben-Israel supra note 38 at 87.

⁶⁰ Craven supra note 18 at 281; Ben Israel supra note 38 at 87-89.

A further suggestion with respect to the interpretation of the limitation provision within Article 8(1)(d) relates to Article 4 of the ICESCR that operates as a general limitation provision for the entire Covenant. State parties agree that the guarantees under the Covenant can only be limited *in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society*. Ben-Israel suggests that Article 4 affects the interpretation of the limitation within Article 8(1)(d), whereby the right to strike can only be limited in so far as such a limitation is compatible with the general nature of the right, and solely for the purpose of promoting the general welfare in a democratic society.⁶¹ However, Craven suggests that the limitation in Article 4 only applies to articles of the Covenant that are not subject to an existing internal restriction.⁶² Therefore, opinion is divided on the effect of Article 4 on the limitation within Article 8(1)(d).

Article 8(2)

ICESCR Article 8(2) provides:

[t]his article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

Article 8(2) of the ICESCR allows for the State to impose greater restrictions on the exercise of the right to strike by the military, the police or workers involved in the administration of the State.⁶³ It is suggested by Ben-Israel that the inclusion of Article 8(2) provides guidance for the interpretation of Article 8(1)(d) as these specific categories of workers are singled out as groups whose right to strike the State can legitimately restrict.⁶⁴

⁶¹ Ben-Israel, *supra* note 38 at 88.

⁶² Craven, *supra* note 18 at 271.

⁶³ Alston and Quinn, *supra* note 37 at 214. Craven suggests that the meaning of Article 8(2) may be affected by Article 5(2) of the ICESCR. Article 5(2) provides that "[n]o restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent". Craven argues that this article may be interpreted to suggest that restrictions on the right to strike of the police, military or of workers in the administration of the State will only be valid under Article 8(2) if they were imposed before ratification of the ICESCR by a ratifying State, otherwise it would be a restriction of the rights of an individual previously enjoyed under the laws of the ratifying State. See Craven, *supra* note 18 at 284.

⁶⁴ R. Ben-Israel, 'Strikes, Lockouts and Other Kinds of Hostile Actions' in B. Hepple, (ed.) *International Encyclopedia of Comparative Law* (Martinus Nijhoff Publishers: Dordrecht, 1997) at 7.

Article 8(3)

ICESCR Article 8(3) provides,

[n]othing in this article shall authorise State Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

This provision is almost identical to Article 22(3) of the ICCPR and, accordingly, raises the same questions of interpretation. State parties who have ratified the relevant ILO Convention will be bound by its terms irrespective of their ratification of the ICESCR. It has been suggested that the Article was included to stop States who have ratified ILO Convention 87 from invoking the provisions of the ICESCR to reduce the obligations contained in Convention 87.⁶⁵ Further, Ben-Israel argues that for States who have ratified ILO Convention 87, Article 8(3) implies that the right to strike within their domestic laws cannot fall below ILO standards.⁶⁶

The inclusion of the article could also suggest that ILO Convention 87 may provide a basis to assist in evaluating the content of the right in the ICESCR.⁶⁷ Support for this suggestion may be found in the fact that CECSCR makes reference to ILO Conventions in assessing the progress of a State with respect to ICESCR obligations.⁶⁸ However, ILO Conventions do not constitute a recognised source of interpretative material for the ICESCR in international law.

Conclusion

Chapter 2 has set out the basis of Australia's obligation under the UN human rights regime to respect and implement a domestic right to strike. Australia is bound by both the ICCPR and the ICESCR and is subject to an express obligation under the ICESCR and may be subject to an implicit obligation under the ICCPR. However, while the

⁶⁵ Alston and Quinn, *supra* note 37 at 215.

⁶⁶ Ben-Israel, *supra* note 64 at 7.

⁶⁷ Craven, *supra* note 18 at 260 and 263.

⁶⁸ For example, the CESCR within its *Concluding Observations on Economic, Social and Cultural Rights: Australia*, 01/09/2000, E/C.12/1Add.50 at para 29, recommended that Australia limit the prohibitions on the right to strike in essential services, in accordance with ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise.

existence of the obligation within the ICESCR is clear, the nature and scope of the right to strike has not been sufficiently delineated.

Chapter 3 will consider the obligation to respect the right to strike encompassed as an implicit element in the principle of freedom of association contained within the instruments of the ILO.

Chapter Three

The Right to Strike and the International Labour Organization

Introduction

The right of employers and workers to organise and freedom of action for their organizations are of special significance for the activities of an Organization that is composed not only of government representatives but also of those of national employers' and workers' organizations.¹

The most significant and well-developed international obligation to recognise the right to strike comes from the instruments of the International Labour Organization (ILO). This is the case despite the fact that these instruments do not entrench an express statement of the right to strike. Instead, the right to strike operates as an implicit element of the core ILO principle of freedom of association.

The absence of a direct expression of the right is surprising in the context of an organization dedicated to the improvement of workers rights and working conditions. However, it has not hampered the development of extensive quasi jurisprudence expressing the right to strike and delineating its boundaries within the framework of its expression as an implicit component of freedom of association.² Freedom of action for worker and employer organizations is a core principle for an organization unique in international law for its representation of States and civil society, specifically, tripartite representation of governments, workers and employers. No other international organization provides non-State actors with a central role or an equal vote throughout all levels and decisions of the organization.³ It is this tripartite composition, the strong entrenchment of the principle of freedom of association and an explicit commitment to the functional collective interpretation of freedom of association that makes ILO instruments the most significant source of the obligation

¹ J. M. Servais, 'International Labour Organization Standards on Freedom of Association and their Implementation' (1984) 123 *International Labour Review* 765 at 769.

² For discussion of the term quasi-jurisprudence when referring to the commentary of ILO bodies see the discussion to follow in this chapter at 80-82.

³ For an extensive study of tripartism within the ILO see: A. Tikriti, *Tripartism and the International Labour Organization* (Almqvist and Wiksell International: Stockholm, 1982).

to provide a right to strike in international law, despite the absence of an express entrenched statement.

In order to canvass the right to strike implicit within ILO instruments it will be necessary to outline the organizational structure of the ILO and demonstrate the importance of the principle of freedom of association. To achieve this, chapter 3 will:

- outline the constitutional and legislative structure of the ILO;
- discuss the source of the right to strike within ILO instruments, namely the ILO Constitution, the Fundamental Declaration of Rights and Principles at Work 1998 and the ILO Freedom of Association Conventions; and
- undertake detailed examination of the content of the right to strike expressed in the quasi jurisprudence of ILO supervisory bodies.

Constitutional and Legislative Structure of the ILO

The ILO was established in 1919 as an organ of the League of Nations and has operated as an agency of the United Nations since 1946.⁴ The Constitution of the ILO, along with the Declaration of Philadelphia, sets out the aims of the Organization and governs the legislative structure. In addition, the preamble of the Constitution dedicates the organization to the principles of social justice: “whereas universal and lasting peace can be established only if it is based upon social justice”.

The Declaration of Philadelphia, designed to restate the basic aims and purposes of the organization and to expand the mandate of the ILO into the field of social justice, was annexed to the Constitution of the ILO in 1944.⁵ The Declaration restated the

⁴ There are many studies of the ILO that set out the history of the Organization. A sample includes A. Alcock, *History of the International Labour Organization* (MacMillan: Great Britain, 1971); C. W. Jenks, *Social Justice in the Law of Nations* (Oxford University Press: London, 1970); C. W. Jenks, ‘Human Rights, Social Justice and Peace: The Broader Significance of the International Labour Organization Experience’ (Paper presented at International Protection of Human Rights: Proceedings of the Seventh Nobel Symposium, Oslo, September 25-27, 1967); G. A. Johnston, *The International Labour Organization* (Europa Publishers: London, 1970); D. A. Morse, *The Origin and Evolution of the International Labour Organization and its Role in the World Community* (New York State School of Industrial and Labor Relations, Cornell University: New York, 1969); T. Shotwell, *The Origins of the International Labour Organization* (Columbia University Press: Columbia, 1934). A further oft cited source of references for the origins of the ILO is a bibliography: G. von Potobsky and H. G. Bartolemei de la Cruz, *La Organización Internacional del Trabajo* (Astrea, Buenos Aires 1990); the author has not sighted this work.

⁵ *Declaration Concerning the Aims and Purposes of the International Labour Organization*, annexed to the Constitution of the ILO at the twenty-sixth session, General Conference on 10 May, 1944. For discussion of the adoption of the Declaration of Philadelphia see J. D. French, ‘The Declaration of Philadelphia and the Global Social Charter of the United Nations, 1944-45’ in W. Sengenberger and D.

original Constitutional commitment that lasting peace can be established only if it is based on social justice. It also expanded the ILO's role beyond a focus on the employment relationship into broader questions facing workers and their organizations. An important element of this commitment is the principle of freedom of association and the effective recognition of the right of collective bargaining.⁶ This ongoing commitment to freedom of association will be the focus of this discussion of the organizational structure, canvassing areas of the ILO directly relevant to the discussion. Under Article 2 of the Constitution, the ILO consists of three separate bodies – the International Labour Conference, the International Labour Office and the Governing Body.

The International Labour Conference

The International Labour Conference (the Conference) constitutes the legislative arm of the ILO and is the ultimate authority for all resolutions of the ILO.⁷ The Conference is tripartite in composition, comprising four delegates from each ILO Member State, two delegates representing government, one representing the most representative employer organization, and one representing the most representative employee organization.⁸ Each delegate to the Conference votes individually and the government delegates do not control the votes of employer and employee delegates

Campbell, (eds.) *International Labour Standards and Economic Interdependence* (International Institute for Labour Studies: Geneva, 1994), 19 at 19; E. Lee, 'The Declaration of Philadelphia: Retrospect and Prospect' (1994) 133 *International Labour Review* 467.

⁶ Article III(e), Declaration of Philadelphia, ILO.

⁷ The concept of the International Labour Office as the Organizations' Legislative Arm is used by Bartolomei de la Cruz who notes that the Conference has often been called the "International Social Parliament": H. G. Bartolomei de la Cruz, 'International Labour Law: Renewal or Decline?' (1994) 10 *International Journal of Comparative Labour Law and Industrial Relations* 201 at 202. This phraseology is repeated by Bartolomei de la Cruz in writings undertaken in conjunction with von Potobsky and Swepston who refer to the Conventions of the ILO as "legislative instruments": H. Bartolomei de la Cruz, G. von Potobsky and L. Swepston, *The International Labor Organization: The International Standards System and Basic Human Rights* (Westview Press: Boulder, 1996) at 23.

⁸ ILO Constitution, Article 3(1). Throughout the history of the ILO, difficulties have been encountered with the concept of the 'most representative' worker and employer organizations. The difficulties in definition have related to communist nations during the cold war and more recently difficulties resulting from declining union density. For detailed accounts of these difficulties see S. Cooney, 'Testing times for the ILO: Institutional Reform for the New International Political Economy' (1999) 20 *Comparative Labor Law and Policy Journal* 365 at 370 – 373; E. Osieke, *Constitutional Law and Practice in the International Labour Organization* (Martinus Nijhoff Publishers: Dordrecht, 1985); N. Valticos and G. von Potobsky, *International Labour Law* (2nd ed., Kluwer Law and Taxation Publishers: Deventer, 1995).

from the same State.⁹ Decisions of the Conference, unlike those made by any other international agency, reflect the input of a significant proportion of potential affected parties, lending greater legitimacy to Conference decisions.¹⁰

The Conference convenes in Geneva each year for approximately three weeks, during which time it is responsible for resolutions of the ILO and the passage of Conventions and Recommendations. Conventions and Recommendations are the “principal instruments by which international labor standards are expressed”.¹¹ Conventions create international legal obligations, binding when ratified and Recommendations represent non-binding guidelines for national action.¹² The Governing Body of the ILO, which acts as the Organizations’ executive arm, determines the agenda of the Conference.¹³ The Governing Body is responsible for ensuring that agenda items receive technical preparation, and that prior consultation with Member States takes place.¹⁴ Such preparation is extremely thorough in order to maintain the quality of ILO standards:

The intense technical preparation that precedes and accompanies the framing of Conventions and Recommendations is the best possible guarantee that an international instrument will be adopted only when its subject matter has reached a high degree of maturity internationally.¹⁵

Conventions and Recommendations can only be passed by a two third majority of the Conference, ensuring that no one ‘grouping’ of government, employers or employees can successfully pass a Convention or Recommendation without the support of at least one other of the groupings.¹⁶ Further, as they represent only 50% of the Conference, employers and employees cannot combine to out-vote Member States. This ensures that Conventions or Recommendations attain a measure of State support

⁹ ILO Constitution, Article 4(1). In order to ensure parity between employer and employee delegates, if one of the Member States fails to nominate one of the non governmental (employer/employee) delegates, or one is refused entry, the other shall not have voting rights – Article 4(2) and (3) ILO Constitution.

¹⁰ B. Creighton, ‘The Workplace Relations Act in International Perspective’ (1997) 10 *Australian Journal of Labour Law* 31; Valticos and von Potobsky, *supra* note 8 at 35.

¹¹ Bartolomei de la Cruz, von Potobsky and Swepston, *supra* note 7 at 20.

¹² *Ibid.* For discussion of the legal nature of Conventions and Recommendations see pages 21-24.

¹³ ILO Constitution, Article 14(1).

¹⁴ ILO Constitution, Article 14(2).

¹⁵ Bartolomei de la Cruz, *supra* note 7 at 203. For discussion of the technical preparation undertaken by the International Labour Office see Bartolomei de la Cruz, von Potobsky and Swepston, *supra* note 7 at 37-48.

¹⁶ ILO Constitution, Article 19(2).

prior to passage. If Conventions and Recommendations could be passed without Member State support, they might not attract ratifications and the result could be a proliferation of instruments redundant in the sense that Member States have demonstrated no commitment to them.¹⁷

In the process of framing Conventions and Recommendations of general application, the Conference is directed to “have due regard” to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions of those nations substantially different, and suggest modifications where appropriate.¹⁸ This is aimed at ensuring that Conventions are written with sufficient flexibility to allow them to be incorporated into the domestic laws of all Member States.¹⁹ Osieke notes that flexibility clauses “help in making the ILO’s standards much more acceptable to the developing countries, and applicable by the general membership”.²⁰ Further, as the ILO Constitution does not allow for ratification with reservations, flexibility clauses allow Conventions to cater to the maximum number of Member State legal, economic and political environments.²¹ Finally, denunciation of ratified Conventions may only occur in accordance with the terms of each particular Convention, usually at ten-year intervals from adoption.²²

After an adopted Convention has been communicated to Member States, each Member undertakes to bring the Convention before its “competent authority” for the enactment of legislation or other measures within one year.²³ Member States are

¹⁷ Osieke, *supra* note 8 at 52.

¹⁸ ILO Constitution, Article 13(3). For discussion of the importance of ensuring that non-prescriptive international labour standards are phrased in an adaptable and flexible manner see the discussion of comparativism in the Introduction at 17-19.

¹⁹ Bartolomei de la Cruz, von Potobsky and Swepston, *supra* note 7 at 42; Osieke, *supra* note 8 at 147.

²⁰ Osieke, *supra* note 8 at 147-148.

²¹ Bartolomei de la Cruz, von Potobsky and Swepston, *supra* note 7 at 50.

²² *Ibid* at 55. In 1997, as a part of the ILO program to rationalise Conventions, the International Labour Conference passed an amendment to the ILO Constitution inserting a new Article 19(9). The new provision will allow for the abrogation of any Convention adopted by the Conference if it appears that it has lost its purpose or no longer makes a useful contribution to attaining the objectives of the ILO: *Constitution of the International Labour Organization Instrument of Amendment*, 1997. As at the date of writing, the amendment has received 79 of the 118 ratifications that it needs to come into force.

²³ ILO Constitution, Article 19(5). The *competent authority* is the authority with “the power to legislate or take other action in order to implement Conventions and Recommendations”: *Memorandum Concerning the Obligation to Submit Conventions and Recommendations to the Competent Authority*,

required to inform the ILO Director-General of the measures taken to comply with this requirement, the authorities to whom the Convention was publicised and any action taken by those authorities. A Member must then communicate either the fact of formal ratification or, if no ratification has taken place, comply with reporting requirements set down by the Governing Body on the relevant law of the Member State and obstacles to ratification.²⁴

Ratification of a Convention by a Member State entails an obligation, under the terms of the ILO Constitution Article 19(5)(d) to “take such action as may be necessary to make effective the provisions of such Convention”. Such steps will frequently be legislative but may also entail administrative, practical or promotional activities. The nature of the activities required will always depend upon the terms of each Convention.²⁵ A similar procedure applies with respect to Recommendations adopted by the Conference. Adopted Recommendations are to be communicated to all Members, who undertake to bring the Recommendation before the relevant national authorities within one year. As Recommendations are not open to ratification, Member States undertake to report at appropriate intervals to the ILO Director-General on the status of their law and practice with regard to the terms of the Recommendation.²⁶

In addition to these provisions for ratification and reporting, the Constitution of the ILO ensures that Conventions and Recommendations operate as minimum standards. The adoption by the Conference or ratification by a Member State of any Convention or Recommendation of the ILO cannot be deemed to affect any law, award, custom or agreement in a Member State that provides for more favourable conditions.²⁷ Therefore, in unitary states where ratification of a Convention has the effect of applying that Convention in national law, ratification will not automatically reduce more favourable working standards.²⁸ Finally, the ILO Constitution contains

Principal Conclusions of the CEACR and of the Conference Committee, cited in Bartolomei de la Cruz, von Potobsky and Swebston, *supra* note 7 at 46.

²⁴ ILO Constitution, Article 19(5).

²⁵ Bartolomei de la Cruz, von Potobsky and Swebston, *supra* note 7 at 52.

²⁶ ILO Constitution, Article 19(6).

²⁷ ILO Constitution, Article 19(8).

²⁸ Bartolomei de la Cruz, von Potobsky and Swebston, *supra* note 7 at 43 – 44. In unitary States, ratification of an international instrument has the effect of implementing that instrument into domestic

mechanisms for reporting on the status of ratified Conventions, a complaint mechanism and an interpretative mechanism. These will be addressed in turn as the chapter explores the source of the right to strike within ILO instruments and monitoring by ILO agencies.

The International Labour Office

The International Labour Office (the Office) is the permanent secretariat of the ILO, controlled by the Governing Body and managed by the Director-General.²⁹ The Director-General is appointed by and responsible to the Governing Body.³⁰ The Director-General is obliged to attend all meetings of the Governing Body and acts as the Secretary-General of the Conference.³¹ The current Director-General is Juan Somavia of Chile who was appointed in March 1999.³²

The functions of the International Labour Office include management and document preparation for the Conference, assistance to Member States with the implementation of Conference decisions and improvement of domestic regulation, production of appropriate publications and such other powers and duties as the Conference or the Governing Body determine.³³

The Governing Body

The Governing Body is constituted under Article 2 of the ILO Constitution and acts as the executive arm of the International Labour Office, providing executive decision making and policy guidance for the ILO. The Governing Body consists of fifty-six delegates, twenty-eight of which represent governments, fourteen represent employers and fourteen represent workers. Ten of the twenty-eight government representatives are appointed by “Members of chief industrial importance” and the other eighteen are

law. In dualist States, ratification constitutes an agreement to be bound in international law but does not have any effect on domestic legislation. In dualist States international instruments will have limited effect in domestic law until legislation is passed to give effect to those obligations. For information of the effect of ratification in unitary jurisdictions see V. Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Martinus Nijhoff Publishers: The Hague, 1982).

²⁹ ILO Constitution, Article 2.

³⁰ ILO Constitution, Article 8.

³¹ ILO Constitution, Articles 8(2) and 15(1).

³² Information sourced from the ILO website at www.ilo.org.

³³ ILO Constitution, Article 10.

appointed by States chosen from remaining Member States during the Conference.³⁴ The employer and worker delegates elect the employer and worker representatives respectively at the Conference.³⁵ The term of office of each respective Governing Body is three years.³⁶ During the annual session of the Conference, the Governing Body is responsible for setting the agenda, tabling the annual budget and detailing the work of the various Governing Body Committees.³⁷

Sources of the Right to Strike in ILO Instruments

While there is no express statement of the right to strike within the instruments of the ILO, the ILO recognises the existence of an obligation on the part of all Member States to provide a right to strike. This obligation exists as a component of the obligation upon all Member States to uphold the principle of freedom of association. A survey of the sources of the obligation to uphold freedom of association will provide a concurrent survey of the sources of the implicit right to strike within the principle of freedom of association.³⁸

The Constitution of the ILO

The Constitution of the ILO, adopted in 1919, is binding upon all Member States. The principle of freedom of association is contained within the preamble of the Constitution as one of the core principles which the ILO was established to achieve:

³⁴ ILO Constitution, Article 7(2). The Members of chief industrial importance who hold the ten permanent seats on the Governing Body are Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, The United Kingdom and the United States. Information sourced from Governing Body, *Composition of the Governing Body of the International Labour Office*, Geneva, GB.05 (2002-2005) (Rev.1).

³⁵ ILO Constitution, Article 7(4). While Australia has not had a Government representative on the Governing Body since 1996, the current titular membership contains two Australians, Mr B. Noakes, an employer representative and Ms S. Burrow, a worker representative. Information sourced from Governing Body, *Composition of the Governing Body of the International Labour Office*, Geneva, GB.05 (2002-2005) (Rev.1).

³⁶ ILO Constitution, Article 7(5). The current Governing Body was elected on 10 June 2002. Information sourced from Governing Body, *Composition of the Governing Body of the International Labour Office*, Geneva, GB.05 (2002-2005) (Rev.1).

³⁷ Each year the Chairperson of the Governing Body submits a Report to the Conference detailing the activities of the Governing Body over the preceding year – See – ILO, *Report of the Chairperson of the Governing Body to the Conference for the year 2003 – 2004*, 92nd Session, Geneva 2004, ILC 92-PR3-2004-05-0160-1-En.Doc.

³⁸ For discussion of the centrality of freedom of association within the ILO see B. Creighton, 'Freedom of Association' in R. Blanpain and C. Engels, (eds.) *Comparative Labour Law and Industrial Relations In Industrialized Market Economies* (7th ed., Kluwer Law International: The Hague, 2001), 227; L. Swepston, 'Human Rights Law and Freedom of Association: Development through ILO Supervision' (1998) 137 *International Labour Review* 169.

[w]hereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by ... **recognition of the principle of freedom of association** ... The High Contracting Parties, moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world, and with a view to attaining the objectives set forth in this Preamble, agree to the following Constitution of the International Labour Organization.³⁹

The commitment of the ILO to the principle of freedom of association was strengthened by the Constitutional annexation of the Declaration of Philadelphia in 1944. Article I(b) of the Declaration reaffirms the fundamental principles of the ILO, in particular that “freedom of association is essential to sustained progress”.

The consequence of the ILO Constitutional commitment to the principle of freedom of association is that Member States of the ILO are bound to respect the principle even if they have not ratified the relevant ILO Conventions.⁴⁰ The ILO Constitution operates as an alternative source of international legal obligations upon Member States:

[w]hile the Constitution of the ILO contains mainly provisions relating to the organs and the functioning of the Organization, it also lays down a number of general principles which have come to be regarded in certain respects as a direct source of law ILO bodies have frequently drawn legal consequences from them, particularly in the field of freedom of association ... and States Members of the ILO have been regarded as bound to some extent by these Constitutional principles.⁴¹

There are no formal mechanisms in place to govern non-compliance with the general principles contained within the ILO Constitution. However, the Governing Body’s Committee on Freedom of Association (CFA) which hears complaints relating to

³⁹ Preamble, ILO Constitution, emphasis added.

⁴⁰ International Labour Office, *Freedom of Association and Collective Bargaining; General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98) 1949*, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 81st Session 1994, Report III (Part 4B), Geneva (The ‘General Survey, 1994’), para 7. Two examples of Member States that have not ratified the Freedom of Association Conventions but would be taken to have committed to the principle by virtue of their membership of the Organization are New Zealand and the United States of America. Ratification information sourced from the *Applis* (Application of International Labour Standards) database on the ILO website – www.ilo.org.

⁴¹ Valticos and Von Potobsky, *supra* note 8 at 49.

breaches of the specific freedom of association Conventions, also entertains complaints alleging violation of the Constitutional principle of freedom of association. In *Complaint against the Government of New Zealand presented by the New Zealand Council of Trade Unions (NZCTU)* (the *New Zealand determination*) the Committee on Freedom of Association determined that the New Zealand *Employment Contracts Act* 1991 was in breach of the obligation to promote collective bargaining, an express facet of the principle of freedom of association contained in the Declaration of Philadelphia.⁴² The New Zealand government questioned the mandate of the Committee, arguing that it had no jurisdiction given that New Zealand had not ratified the freedom of association Conventions. However, the Committee affirmed that:

[b]y membership of the International Labour Organization, each member State is bound to respect a certain number of principles, including the principles of freedom of association which have become rules above the Conventions ... Such complaints may be presented whether or not the country concerned has ratified the freedom of association Conventions.⁴³

The issue that remains less clear is the nature of the Constitutional commitment to freedom of association and whether this extends to a right to strike. Ben-Israel discusses a complaint made against Spain that was determined by the Committee on Freedom of Association.⁴⁴ Spain had not ratified the freedom of association Conventions at the time; however the CFA determined that Spain was obliged to provide a right to strike as a facet of its obligation to observe the principle of freedom of association.⁴⁵ Ben-Israel concluded that:

the labour standard laid out in Conventions Nos. 87 and 98 [the freedom of association conventions], served the CFA as a yardstick to measure the fundamental principle of freedom of association and its complementary right to strike which were safeguarded by the ILO Constitution.⁴⁶

⁴² Committee on Freedom of Association, *Complaint against the Government of New Zealand presented by the New Zealand Council of Trade Unions*, Document Vol. LXXVII, 1994, Series B, No. 3, Report No. 295, Case No. 1698.

⁴³ *Ibid*, para 240; The Committee cited the General Survey 1994 of the CEACR at paras 34 and 53 in further support of their decision that the CFA did have the jurisdiction to hear the complaint.

⁴⁴ Committee on Freedom of Association, Report 149, Case 678, cited in R. Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer Law and Taxation Publishers: Deventer, 1988) at 69.

⁴⁵ Spain subsequently ratified both Freedom of Association Conventions in 1977. Ratification information sourced from the *Applis* (Application of International Labour Standards) database on the ILO website: www.ilo.org.

⁴⁶ Ben-Israel, 1988, *supra* note 44 at 70.

This argument is supported by the finding in the *New Zealand determination*. It was alleged that a prohibition of strikes and lockouts in certain circumstances within the *Employment Contracts Act 1991* (NZ) was in breach of the obligation to provide a right to strike. The Committee on Freedom of Association agreed, recalling principles set down through the interpretation of the freedom of association Conventions as to the appropriate limitations that may be placed on otherwise legitimate strike action.⁴⁷ This illustrates that the CFA is prepared to apply the principles developed under the freedom of association Conventions, including the implied right to strike, to the Constitutional obligation on Member States to respect and implement the principle of freedom of association.

In summary, the Constitution of the ILO commits Member States to the principle of freedom of association, and therefore to the implicit right to strike. This commitment accrues to Member States irrespective of their ratification of the freedom of association Conventions.

There are two other sources of the obligation to provide a right to strike, in the Fundamental Declaration of Rights and Principles at Work 1998 and the Freedom of Association Conventions.

The 1998 Fundamental Declaration on Principles and Rights at Work

In 1998 the Conference adopted the Declaration on Fundamental Principles and Rights at Work ('the Declaration').⁴⁸ The Declaration was the result of a four year campaign by then Director-General Michael Hansenne to increase the number of ratifications of the 'core' or 'fundamental' labour standards.⁴⁹ The Declaration is promotional in character, to encourage future ratification of the core Conventions.⁵⁰

⁴⁷ *New Zealand Determination*, supra note 42 at para 259.

⁴⁸ Declaration on Fundamental Principles and Rights at Work, ILO, 1998, Document CIT/1998/PR20A. For general information on the Declaration see H. Kellerson, 'The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future?' (1998) 137 *International Labour Review* 223; J. R. Bellace, 'The ILO Declaration of Fundamental Principles and Rights at Work' (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 269.

⁴⁹ Bellace, supra note 48 at 269 – 272.

⁵⁰ L. Swepston, 'The International Labour Organization and Human Rights Access to the ILO' in G. Alfredsson, J. Grimheden, B. Ramcharan and A. de Zayas, (eds.) *International Human Rights Monitoring Mechanisms - Essays in Honour of Jakob Th. Moller* (Kluwer Law International: The Hague, 2001), 485 at 503.

The Declaration commits Members of the ILO to respect, promote and realise four 'core' or 'fundamental' principles irrespective of ratification of the relevant Conventions.⁵¹ The text of the Declaration provides that:

all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.

The first principle set out within the Declaration is freedom of association and effective recognition of the right to collective bargaining. As ILO bodies have consistently interpreted the principle of freedom of association as expressed within ILO instruments to contain an implicit right to strike, the Declaration constitutes a second source of the obligation placed on Member States of the ILO to provide a right to strike.

The Declaration contains a follow up device to "encourage the efforts made by the Members of the Organization to promote the fundamental principles and rights enshrined in the Constitution of the ILO and the Declaration of Philadelphia and reaffirmed in this Declaration".⁵² This entails reports from Member States who have not ratified one or more of the fundamental conventions and an annual global report on the status of one of the four principles.⁵³

The Freedom of Association Conventions

There are two core freedom of association Conventions setting out the substance of the principle of freedom of association. The Conventions are *The Freedom of Association and Protection of the Right to Organise Convention*, 1948, No. 87 and *The Right to Organise and Collective Bargaining Convention*, 1949, No. 98. In order to understand the elaboration of the implicit right to strike within the ILO, it is necessary to understand the supervisorial structures that monitor compliance with

⁵¹ Article 2, Declaration of Fundamental Principles and Rights at Work, 1998.

⁵² Follow-Up to the Declaration, Annex, ILO Declaration on Fundamental Principles and Rights at Work, ILO, 1998, Document CIT/1998/PR20A.

⁵³ The first Global Report on freedom of association was tabled at the International Labour Conference in 2000 – *Your Voice at Work*, Report of the Director-General, International Labour Conference, 88th Session, 2000, Report I(B). For coverage of the follow up process for the Declaration see Bellace, *supra* note 48.

these Conventions and provide the parameters in which interpretation of the Conventions takes place.

The ILO supervisory structure is considered to be the most elaborate and well developed structure of all international organizations that monitor human rights.⁵⁴ It “relies on the principle that all parts of the supervisory system must be mutually supportive, and that all the concerned parties have their role to play in assuring the implementation of standards”.⁵⁵

Reporting and Complaint Procedures for Ratified ILO Conventions⁵⁶

The ILO has developed a sophisticated supervision system consisting of two main mechanisms – reporting processes, whereby Member States report to the ILO on the progress and status of their implementation of ratified Conventions, and a complaints procedure to allow for allegations of non-compliance to be lodged by either another Member State or by individuals. The operation of these mechanisms enables the ILO to bring pressure to bear on non-complying Member States. More importantly for the purposes of this study, it is through these mechanisms that the implicit right to strike was recognised and the content of the right was elaborated.

Reporting Mechanisms

The process that applies to the supervision of Member State implementation of ratified Conventions is set out in Articles 22 and 23 of the Constitution of the ILO. Under Article 22, Member States agree to provide annual reports to the International Labour Office on the measures undertaken to give effect to ratified Conventions. The annual reports of Member States are presented to the International Labour Conference each year along with a summary provided by the Director-General.⁵⁷

⁵⁴ M. Rood, ‘New Developments Within the ILO Supervisory System’ in R. Blanpain, (ed.) *Labour Law, Human Rights and Social Justice* (Kluwer Law International: The Hague, 2001), 87 at 87 – 88; Bartolomei de la Cruz, supra note 7 at 221.

⁵⁵ L. Swepston, ‘International Labour Organization (ILO) Standards and Human Rights’ in Y. Daniele, E. Stamatopoulou and C. J. Dias, (eds.) *The Universal Declaration of Human Right: Fifty Years and Beyond* (Baywood Publishing Company Inc: New York, 1999), 37 at 38.

⁵⁶ The following discussion of ILO supervision, reporting and complaint procedures has been sourced generally from primary ILO Sources, and Bartolomei de la Cruz, von Potobsky and Swepston, supra note 7, part 3; Osieke, supra note 19; D. Tajgman and K. Curtis, *Freedom of Association: A User's Guide* (International Labour Office: Geneva, 2000) and Valticos and von Potobsky, supra note 41.

⁵⁷ ILO Constitution, Article 23.

The annual reporting process created an onerous burden on Member States and the supervision mechanisms of the ILO. To reduce the workload, Member State reports are now submitted on a cyclical rotational basis.⁵⁸ Member States report to the ILO one year after ratification of a Convention, and then three years after ratification. After this, Member States are required to report on the basis of a five year reporting cycle for each Convention, except for certain Conventions of “special importance”, including Conventions 87 and 98, which are maintained on two-year cycles.⁵⁹

Once Article 22 Reports have been submitted by Member States, they are reviewed under a supervision system carried out by two committees of the Conference: the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on the Application of Standards of the International Labour Conference (Conference Committee).

Committee of Experts on the Application of Conventions and Recommendations

The CEACR was established by resolution of the International Labour Conference in 1926 and consists of up to 20 expert jurists, appointed in a personal capacity.⁶⁰ The Committee is responsible for reviewing reports submitted under Article 22 and noting the extent to which each State appears to be in conformity with the obligations undertaken. In addition, the CEACR reviews reports on unratified Conventions under the Fundamental Declaration, reports on the submission of instruments to the competent authorities and reports concerning non-metropolitan territories. The Committee is required to conduct this work with impartiality and objectivity.⁶¹

The CEACR interacts with Member States through the use of Direct Requests and Observations. A Direct Request seeks to clarify issues raised, to ask questions or to seek further information and is communicated directly to the Member State

⁵⁸ Bartolomei de la Cruz, von Potobsky and Swepston, *supra* note 7 at 67.

⁵⁹ *Ibid*, page 68.

⁶⁰ There are currently 19 members of the CEACR. An Australian, Ms. Robyn A. Layton QC is the current chairperson, elected at the 73rd session of the CEACR held in Geneva from 28 November to 13 December, 2002. See General Report of the Committee of Experts on the Application of Conventions and Recommendations, ILO Report III (Part IB), ILC, 92nd Session, 2004.

⁶¹ Bartolomei de la Cruz, von Potobsky and Swepston, *supra* note 7 at 76.

concerned.⁶² An Observation is made when the CEACR considers that a Member State has failed to implement or comply with a ratified Convention and is a public statement by the CEACR that, in its opinion, the member concerned is not complying with their agreed obligations. Observations are published by the CEACR in the annual report of the committee to the Conference.⁶³

The CEACR reports to each session of the Conference on ratification levels and Member State compliance. Part 4B of the CEACR Report constitutes a general survey of CEACR Reports in a particular area of international labour law. This survey provides a mechanism for the CEACR to examine a Convention (or particular issue) and make a statement of the scope of the standards set down in that Convention, assessing the general level of compliance. The CEACR carried out a survey of the scope of freedom of association in 1994, followed up by a 'mini' survey focusing on states that had not ratified the Freedom of Association Conventions in 1998.⁶⁴

Committee on the Application of Standards of the International Labour Conference

The Conference Committee is a Committee of the Conference responsible for examining measures taken by Member States to give effect to ratified Conventions. The Conference Committee is established under Article 7 of the Standing Orders of the Conference and provides a tripartite forum for the public discussion of CEACR reports and General Surveys.⁶⁵ The Officers of the Conference Committee select

⁶² Direct Requests are now made available on-line at <http://webfusion.ilo.org/public/db/standards/normes/index.cfm?lang=EN> in the Applis database.

⁶³ Valticos and von Potobsky, *supra* note 8 at 285-86.

⁶⁴ International Labour Office, *Freedom of Association and Collective Bargaining, General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98) 1949*, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 81st Session 1994, Report III (Part 4B), Geneva (The 'General Survey 1994'). The 'mini survey' of Member States that have not ratified the Freedom of Association Conventions was published in the 1999 General Report of the CEACR. This mini survey occurred prior to the introduction of General Surveys under the Declaration on Fundamental Principles and Rights at Work and was aimed at furthering ratification rates of core ILO Conventions amongst Member States. See CEACR General Report, ILO Report III (Part 1B), ILC 87th Session, 1999, paragraphs 113 – 162.

⁶⁵ Article 7 of the Standing Orders of the International Labour Conference provide that the Conference Committee shall consider:

- (a) the measures taken by Members to give effect to the provisions of Conventions to which they are parties and the information furnished by Members concerning the results of inspections;
- (b) the information and reports concerning Conventions and Recommendations communicated by Members in accordance with Article 19 of the Constitution ...; and
- (c) the measures taken by Members in accordance with Article 35 of the Constitution.

Observations made by the CEACR for individual discussion and invite the Government of the Member State concerned to publicly explain the domestic application of the Convention.⁶⁶ Observations chosen by the Officers are usually cases of serious non-compliance and inclusion of a Member State in this part of the Conference represents one of the more public measures available to the supervisory organs of the ILO.⁶⁷

The Conference Committee prepares a report that is submitted to the Conference. The report reproduces the discussions of the Committee and identifies recalcitrant Member States that have systematically failed to comply with ratified ILO Conventions or other obligations.⁶⁸ This list is not intended to operate as a sanctioning device, however Valticos and von Potobsky point out that it “sometimes gives rise to sharp discussions”.⁶⁹

The reporting system of the ILO is designed to ensure that Member States undertake timely revision of their compliance status and that the ILO maintains an effective and up to date assessment of the implementation of its Conventions in practice. Furthermore, the interaction of the CEACR and the Conference Committee provides a balance between commentary by independent experts (CEACR) and public tripartite debate (Conference Committee). Bartolomei de la Cruz notes the importance of this balance:

The two supervisory bodies complement each other effectively. The Committee of Experts conducts a technical and impartial examination of the cases and the Conference Committee on the Application of Standards – whose conclusions are submitted to the plenary sitting of the Conference – contributes the political weight and influence of an international forum in which governments, employers and workers may speak freely.⁷⁰

Complaint Procedures

The ILO has procedures that enable a Member State or a worker/employer organization to complain about the failure of a Member State to comply with the

⁶⁶ Tajgman and Curtis, *supra* note 56 at 55.

⁶⁷ Bartolomei de la Cruz, von Potobsky and Swepston, *supra* note 7 at 82; Valticos and von Potobsky, *supra* note 8 at 286-287.

⁶⁸ *Ibid.*

⁶⁹ Valticos and von Potobsky, *supra* note 8 at 286.

⁷⁰ Bartolomei de la Cruz, *supra* note 7 at 209.

provisions of a ratified Convention or with the obligations contained within the Constitution of the ILO. The complaint procedures fall into two categories – complaints made by one Member State against another Member State or complaints made by worker/employer organizations against a Member State.

Member State Complaints

The procedure for a complaint by one Member State against another Member State regarding the failure of that Member State to observe ratified Conventions is set out in the ILO Constitution, Articles 26 – 28.

Any Member State of the ILO has the right to file a complaint with the International Labour Office that another Member State is not securing effective observation of a Convention that **both** states have ratified. The complaint is considered by the Governing Body, which may appoint a Commission of Inquiry to examine the complaint and report back.⁷¹ Where the Governing Body is considering a complaint made under this process, the Member State complained of is entitled to send a representative to the Governing Body to participate in relevant proceedings.⁷²

If the Governing Body appoints a Commission of Inquiry, it will not function adequately unless Member States agree to cooperate with the Inquiry and place any relevant information at the disposal of the Commission. The Commission prepares a report that contains findings of fact and makes recommendations as to the steps that should be taken to meet the complaint. The report is communicated to the Governing Body and the Member States involved and published in the ILO Official Bulletin.⁷³ Each Member State involved has the option of refusing to accept the findings of the Commission of Inquiry and referring the complaint to the International Court of

⁷¹ A Commission of Inquiry is made up of “eminent persons chosen for their impartiality”: J. M. Servais, ‘International Labour Organization Standards on Freedom of Association and their Implementation’ (1984) 123 *International Labour Review* 765 at 768. There were two Commissions of Inquiry appointed in 1998 relating to Myanmar (forced labour) and Nigeria (freedom of association), Swepston, *supra* note 55 at 39. In addition, the Governing Body considered establishing a Commission of Inquiry to look into a complaint made against Colombia alleging breaches of the Freedom of Association Conventions, however in 2000 the Governing Body appointed a Special Representative for Cooperation with Colombia for ongoing review - General Report of the Committee of Experts on the Application of Conventions and Recommendations, ILO Report III (Part IB), ILC, 89th Session, 2001, para 30.

⁷² ILO Constitution, Article 26(5).

⁷³ Bartolemei de la Cruz, *supra* note 7 at 207.

Justice.⁷⁴ Where a complaint is referred to the International Court of Justice, its decision on the matter is final.⁷⁵

Worker / Employer Complaints

There are two procedures that allow worker or employer groups to complain about the failure of a Member State to observe a ratified Convention. The first procedure is set out in the Constitution of the ILO and the second procedure relates to a failure to observe the principle of freedom of association.

Constitutional Complaint Mechanism

Article 24 of the ILO Constitution allows for representations to be made to the Governing Body by industrial associations of workers or employers alleging that a Member State has failed to secure effective observation of a ratified Convention.

Where a representation is made, the Governing Body may communicate the representation to the government of the Member State concerned and invite a response. If no response is received from the government or if the Governing Body deems the response to be unsatisfactory, the Governing Body has the right to publish the representation and the response (if any) to it.⁷⁶

⁷⁴ ILO Constitution, Article 29.

⁷⁵ ILO Constitution, Article 31.

⁷⁶ ILO Constitution, Article 25. Each year the General Report of the CEACR details representations made to the Governing Body in the preceding 12 months and notes whether they were declared receivable. Over the years 2001 – 2003 a number of representations were made, demonstrating that this Constitutional procedure remains in use, mainly from workers' organizations. In 2001 representations were deemed receivable against Colombia, Denmark, Ecuador, Chile, the Republic of Moldova and Turkey - ILO Report III (Part IB), ILC, 89th Session, 2001; In 2002 representations were deemed receivable against Guatemala, Colombia, Mexico, Denmark, Ecuador, Ethiopia and New Zealand - ILO Report III (Part IB), ILC, 90th Session, 2002; In 2003 Representations were deemed receivable against Mexico and Guatemala - ILO Report III (Part IB), ILC, 91st Session, 2003.

Committee on Freedom of Association (CFA)

An independent complaint mechanism operates to enable worker and employer organizations, both national and international,⁷⁷ to make formal complaints to the CFA with respect to breaches of the principle of freedom of association.⁷⁸

The CFA, a tripartite body of 9 members, was established by the Governing Body in 1951 and hears complaints alleging breaches of the principle of freedom of association.⁷⁹ The CFA operates in a quasi-judicial manner.⁸⁰ It receives written documents of complaint from the complainant and seeks a response from the Government of the Member State concerned. It does not require the consent of the Member State to examine a complaint and will proceed without obtaining consent or cooperation.⁸¹ After gathering written arguments from the complainant and Member State, the CFA will formulate conclusions. The conclusions assess whether an allegation of infringement has been substantiated, and, if made out, make recommendations requesting that the Member State take remedial action.⁸² CFA determinations are submitted to the Governing Body for approval and the conclusions are published.⁸³

Where CFA conclusions contain recommendations for remedial action by a Member State that has ratified the freedom of association conventions, the CEACR will follow up the recommendations under normal reporting mechanisms.⁸⁴ The reporting and

⁷⁷ Complaints by an organization can only be submitted by a national occupational organization with a direct interest in the matter, by an international organization of employers or workers having consultative status with the ILO or by another international organization of employers or workers where the allegations relate to matters directly affecting its affiliated organizations: G. von-Potobsky, 'Protection of Trade Union Rights: Twenty Years' Work by the Committee on Freedom of Association' (1972) 105 *International Labour Review* 69 at 70, footnote 2.

⁷⁸ Rood, *supra* note 54 at 90. There is also the theoretical right of a Member State to complain to the CFA regarding the breach of another Member State of the principle of freedom of association – see Servais, *supra* note 1 at 770. However, to date, no Member State has exercised this opportunity.

⁷⁹ The basis of the jurisdiction of the CFA is an agreement between the Economic and Social Council and the Governing Body. For a description of the history of the establishment of the CFA see Bartolomei de la Cruz, *supra* note 7 at 209 – 210.

⁸⁰ Von-Potobsky, *supra* note 77 at 70.

⁸¹ Bartolomei de la Cruz, von Potobsky and Swepston, *supra* note 7 at 101.

⁸² Von-Potobsky, *supra* note 77 at 70.

⁸³ CFA decisions are reported as *Reports of the Committee of Freedom of Association of the Governing Body of the ILO* and are published in *Official Bulletin* (Geneva), Series B. In addition, all CFA decisions are summarised in the *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* ('The Digest'). The Digest is currently in its fourth edition, published in 1996.

⁸⁴ Von Potobsky, *supra* note 77 at 82.

supervision mechanisms of the ILO work in tandem with the complaint mechanisms to encourage Member States to implement and comply with their obligations.

Status of Reports, Recommendations and Conclusions of the CFA and CEACR

The ILO right to strike is elaborated within CEACR and CFA interpretations of the principle of freedom of association. Over time these reports and conclusions have come to constitute a significant body of commentary, interpreting the principle of freedom of association, establishing its boundaries and assessing State compliance. However, neither body enjoys an ILO Constitutional mandate to provide authoritative interpretations of Conventions. Article 37(1) of the ILO Constitution provides that any question or dispute relating to the interpretation of the Constitution or of any subsequent Convention shall be referred for decision to the International Court of Justice (ICJ). Accordingly, the ICJ is the only body able to make binding authoritative determinations on the meaning of ILO Conventions, although in practice this mechanism is rarely used and the ICJ has not had an opportunity to consider the quasi jurisprudence on the implicit right to strike.⁸⁵ This means that in Constitutional terms, the implicit right to strike has not yet been confirmed in a binding determination of the ICJ.

In the absence of a referral to the ICJ for interpretation of the principle of freedom of association, CEACR and CFA conclusions and recommendations represent the most comprehensive and authoritative source available on the principle of freedom of association contained within ILO Conventions and the implicit right to strike. However, it is important to recognise that the decisions are not jurisprudence and the bodies are not courts.⁸⁶ The material is not written in a judicial style and does not adhere to the principles of legal reasoning and analysis. It can be difficult to locate the reasoning behind the recommendations or conclusions, or to ascertain legal method or systematic analysis within the material. Where conclusions are to be drawn in a report or a complaint the committees will 'note' facts, express 'regret' or 'request' that the Member State bring their law and practice into compliance. The most powerful

⁸⁵ Bartolomei de la Cruz, von Potobsky and Sweptson, *supra* note 8 at 35 point out that the ICJ procedure has only been used once, in 1932 with respect to a question concerning the Night Work (Women) Convention, 1919 (No. 4).

statement of the CEACR is the phrase 'deep regret' and is intended to convey that the Member State concerned is in flagrant or long standing violation of a ratified Convention. The language of the committees can be very difficult to follow, as explored by Bellace:

[t]he official report of the Committee of Experts is written in a technical, highly formulaic and understated fashion. Those who follow the ILO closely and regular attendees at the Conference pick up the nuanced differences between an Observation that begins 'the Committee notes' compared to one that begins 'the Committee notes with concern'. They will be aware that the latter phrase is actually quite strong. Others, including labor law academics and students, who may wish to read the Committee of Experts' report to ascertain the current situation in a given country with regard to a specific situation, are invariably frustrated for it is often impossible to understand the Committees' comments without having seen past reports, without having seen the governments' report, and without an understanding of how the Committee of Experts uses language.⁸⁷

Despite these shortcomings, CEACR and CFA commentary is well respected, effective in practice and is considered to constitute a form of quasi-jurisprudence.⁸⁸

Servais argues that high status attaches to CEACR commentary because CEACR members are independent experts and the critique process is public.⁸⁹ Servais further contends that CEACR and CFA decisions are objective, with accurate analysis and commentary designed to encourage cooperation and greater dialogue.⁹⁰ The advantage of CFA determinations, according to Hodges-Aaberhart and Odero, is the flexibility that the absence of an express statement of the right to strike gives the CFA:

[t]hough it suffers from the disadvantages inevitably arising from the absence of formal international obligations, such as those that result from the ratification of a Convention, this case law has the advantage of developing principles that are capable of growth and adaptation in the light of changing circumstances ... [and are more able to] grapple with the unforeseen case than a procedure applying rules, which are either precise, therefore in some measure preconceived, or so general in character as to be of limited value as either rules or obligations.⁹¹

⁸⁶ Committee on Freedom of Association, Report 234, doc GB.226/5/18, para 27, cited in Servais, *supra* note 1 at 771.

⁸⁷ Bellace, *supra* note 48 at 280.

⁸⁸ The Committee on Freedom of Association considers itself to be a quasi-judicial body – Bartolemei de la Cruz, von Potobsky and Swepston, *supra* note 8 at 36.

⁸⁹ Servais, *supra* note 1 at 767.

⁹⁰ *Ibid* at 780.

⁹¹ J. Hodges-Aeberhard and A. Dios de Odero, 'Principles of the Committee on Freedom of Association Concerning Strikes' (1987) 126 *International Labour Review* 543 at 561.

In conclusion, the commentary under consideration is not formally binding or authoritative. However, both the CFA and the CEACR have built up consistent, systematic sets of interpretative principles based on the reports and complaints that they are responsible for examining. In the absence of a referral to the ICJ, this body of quasi-jurisprudence is the most authoritative source for the proposition that the right to strike is implicit in the principle of freedom of association expressed within ILO sources.

Quasi-Jurisprudence Establishing the Existence of the Implicit Right to Strike

The main expressions of the principle of freedom of association and the contexts in which the implicit right to strike has been developed are the freedom of association Conventions.

*Freedom of Association and Protection of the Right to Organise Convention, 1948, No. 87*⁹²

Whilst there is no express statement of the right to strike in Convention 87, the CEACR and CFA have consistently found an implicit right to strike in the principle of freedom of association as expressed in the following Articles:

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorisation.

Article 3

1. Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

⁹² For discussion of the history of Convention No. 87 see H. Dunning, 'The Origins of Convention No 87 on Freedom of Association and the Right to Organise' (1998) 137 *International Labour Review* 149. For discussion of the impact of the Convention see von Potobsky, *supra* note 63.

Article 10

In this Convention the term organization means any organization of workers or of employers for furthering and defending the interests of workers or of employers.

Articles 2, 3 and 10 combine to ensure that workers and employers have the right to form and join organizations established for the purposes of furthering and defending their interests. They also have the explicit right to draw up their constitutions and rules, elect their representatives in full freedom, organise their administration and activities and formulate their programs. According to the CEACR, the right to strike is an essential and intrinsic element of these activities:

[t]he right to strike is one of the essential means available to workers and their organizations for the promotion and protection of their economic and social interests. These interests not only have to do with better working conditions and pursuing collective demands of an occupational nature, but also with seeking solutions to economic and social policy questions and to labour problems of any kind which are of direct concern to workers.⁹³

In the 1994 General Survey of the principles of freedom of association the CEACR restated its commitment to this construction of freedom of association: “the Committee confirms its basic position that the right to strike is an intrinsic corollary of the right to organise protected by Convention 87”.⁹⁴ In contrast to the trend towards individualism evident in many ILO Member States, the CEACR reaffirmed that the right implicit within the Convention is a collective right.⁹⁵

Under Article 3(1) of Convention No. 87, the right to organise activities and to formulate programmes is recognised for workers’ and employers’ *organizations*. In the view of the Committee, strike action is part of these activities under the provisions of Article 3; it is a collective right exercised, in the case of workers, by a group of persons who decide not to work in order to have their demands met. The right to strike is therefore considered as an activity of workers’ organizations within the meaning of Article 3.⁹⁶

⁹³ ILO, *Freedom of Association and Collective Bargaining*, General Survey by the Committee of Experts on the Application of the Conventions on Freedom of Association, the Right to Organise and Collective Bargaining and the Convention and Recommendation concerning rural workers’ organizations, Report III (Part 4B), International Labour Conference, 1983, 69th Session, paras 200 and 205. Affirmed in the General Survey 1994, *supra* note 40 at para 147.

⁹⁴ General Survey 1994, *supra* note 40 at para 151.

⁹⁵ In the 1994 General Survey, the CEACR expressed “concern at two trends occurring in certain industrialized countries in particular, which have a negative impact on collective rights and collective bargaining. First, in several countries there has been a recent tendency for the legislature to give precedence to individual rights over collective rights in employment matters. Second ... structural change may be used to undermine the trade unions if the necessary measures are not taken by the authorities”. General Survey, *supra* note 40 at para 236.

⁹⁶ General Survey 1994, *supra* note 40 at para 149, italics in original.

In recognising the right to strike as collective in nature, the CEACR does not dictate that the right is only exercisable by trade unions. Novitz points out that both the CEACR and CFA have been careful to note that the right belongs to groups rather than trade unions.⁹⁷ This construction of the right recognises that workers may form groups in pursuit of their own interests that may not take the traditional form of a trade union but that have an equal right to exercise the rights inherent in the principle of freedom of association.

The right to strike implicit in Convention 87 is not an absolute right and may be governed by provisions imposing conditions or restrictions on its exercise.⁹⁸ There is extensive CEACR and CFA commentary on the scope of legitimate restrictions on the right to strike. After an examination of the implicit right to strike in Convention 98, the remainder of this chapter will consider the commentary exploring the right to strike.

Right to Organise and Collective Bargaining Convention, 1949, No. 98

The Right to Organise and Collective Bargaining Convention (No. 98) deals with issues related to the right of workers' and employers' organizations to organise and engage in collective bargaining. Articles 1-3 of the Convention seek to protect the right of workers to exercise their right to organise against employers and the right of workers' and employers' organizations against interference from each other. Article 4 of the Convention seeks to ensure the promotion of voluntary collective bargaining within the labour law systems of ratifying Member States.

The relevant provisions of the Convention with respect to the implicit right to strike are set out in Article 1:

- (1) Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
- (2) Such protection shall apply more particularly in respect of acts calculated to -
 - (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

⁹⁷ Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford University Press: Oxford, 2003) at 277.

⁹⁸ General Survey 1994, *supra* note 40 at para 151.

- (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Convention 98 and Convention 87 operate in tandem, in that Convention 98 protects parties against discrimination for engaging in the activities protected by Convention 87. The CEACR recognises this relationship and considers that without Convention 98, the guarantees set out in Convention 87 may be rendered nugatory:

[t]he protection afforded to workers and trade union officials against acts of anti-union discrimination constitutes an essential aspect of freedom of association, since such acts may result in practice in denial of the guarantees laid down in Convention 87.⁹⁹

The extension of protection for workers against discrimination for engaging in strike action is a facet of the relationship between Convention 87 and Convention 98, “[s]ince the maintaining of the employment relationship is a normal consequence of recognition of the right to strike, its exercise should not result in workers being dismissed or discriminated against”.¹⁰⁰

Under Article 6, the guarantees provided in Convention 98 do not apply to public servants engaged in the administration of the State. The CEACR has adopted a restrictive approach to the interpretation of Article 6 whereby only those public servants that are by their functions directly employed in the administration of the State are excluded from the application of the Convention.¹⁰¹ Further, in 1978 the Conference adopted Convention 151, the *Labour Relations (Public Service Convention)* 1978 to extend the protection against acts of anti-union discrimination found in Convention No 98 to public employees engaged in the administration of the State. However Australia has not ratified this Convention.¹⁰²

⁹⁹ Ibid, para 202.

¹⁰⁰ Ibid, para 179.

¹⁰¹ Ibid, para 200.

¹⁰² The preamble to Convention 151 provides:

Taking into account the particular problems arising as to the scope of, and definitions for the purpose of, any international instrument, owing to the differences in many countries between private and public employment, as well as the difficulties of interpretation which have arisen in respect of the application of relevant provisions of the Right to Organise and Collective Bargaining Convention, 1949, to public servants, and the observations of the supervisory bodies of the ILO) on a number of occasions that some governments have applied these

The Content and Scope of the Right to Strike in International Labour Organization Instruments

CFA and CEACR commentaries have discussed the content and scope of the right to strike that is implicit in the principle of freedom of association enshrined within Conventions 87 and 98, the Constitution of the ILO and the Fundamental Declaration of Rights and Principles at Work.¹⁰³ Through consideration of Article 22 Reports and complaints made to the CFA, the CEACR and CFA have defined the boundaries of the implicit right to strike within the principle of freedom of association.

The Definition of Strike

Industrial action can assume a variety of forms including rolling stoppages, work to rule, go slow or the complete cessation of work. At the outset it is important to ascertain which forms of industrial action are protected by the 'right to strike' implicit

provisions in a manner which excludes large groups of public employees from coverage by that Convention ...

¹⁰³ CEACR and CFA commentaries have been sourced from the following primary and secondary materials:

Primary:

1. ILO, *Freedom of Association and Collective Bargaining*, General Survey of the Reports on the Freedom of Association and the Right to Organise Convention (No. 87), 1948 and the Right to Organise and Collective Bargaining Convention (No. 98), 1949. Report III (Part 4B), International Labour Conference, 81st Session, 1994, 'General Survey'.
2. ILO, *Reports of the Committee of Experts on the Application of Conventions and Recommendations: General reports and observations concerning particular countries*, Report III, (Part 1A), International Labour Conference, Geneva.
3. ILO, *Reports of the Committee of Freedom of Association of the Governing Body of the ILO* - published in *Official Bulletin* (Geneva), Series B.
4. ILO, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, Geneva, 4th Edition, 1996, 'The Digest'.

A note on CFA commentary: CFA determinations are reported as *Reports of the Committee of Freedom of Association of the Governing Body of the ILO* and are published in the *Official Bulletin* (Geneva), Series B. Access to CFA determinations has been obtained through three methods. First, all CFA decisions are summarised in the *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (The Digest). The Digest is published by the International Labour Office and is currently in its fourth edition, published in 1996 and is also available on line at www.ilo.org. Second, the full texts of all CFA determinations are available on line at www.ilo.org in the LibSynd Database. Third, the full text of some determinations before 1985 were obtained from the *Official Bulletin*, Series B, supplied by the International Labour Office, Geneva before these were available on-line.

Secondary:

1. B. Gernigon, A. Otero and H. Guido, *ILO Principles Concerning the Right to Strike* (International Labour Office: Geneva, 2000).
2. Ben-Israel, *supra* note 44.

within the principle of freedom of association.¹⁰⁴ There are two issues to be addressed in this context, namely, who may exercise the right to strike and the form that strike action can take.

Who May Exercise the Right to Strike?

The implicit right to strike within the context of the principle of freedom of association has been interpreted by ILO bodies as a right belonging to workers and their organizations. As discussed above, the right is collective, in that it may be exercised by workers as a group or as a trade union.¹⁰⁵ However, the other qualification is that it belongs only to the workers. While the right to strike has been interpreted as an aspect of the right of both workers' and employers' organizations to pursue the interests of their members expressed in Articles 2, 3 and 10 of Convention 87, the ability to take strike action belongs only to workers.¹⁰⁶ This construction of the right to strike as a right belonging to workers, despite the references in the Convention to employers' organizations, is a result of the definition of strike action by the CFA and CEACR as a right of workers to withdraw their labour. The definition has not been extended to include employers' organizations as lockouts are not considered to constitute strike action.

The Form that Strike Action May Take

The CFA adopts a broad construction of activities falling within the definition of 'strike action': "the narrow definition of strike as a work stoppage only has now been replaced by a wide one and includes all the nuances [of strike action] as recognised weapons in collective action".¹⁰⁷ All forms of strike action are considered legitimate provided they remain peaceful. Restrictions on the form that strike action can take will only be justifiable in so far as those restrictions are designed to ensure that strike action remains peaceful.

¹⁰⁴ The ILO use of the term 'strike action' is not limited to the complete cessation of labour but is a broader concept and is inclusive of all forms of labour withdrawal, or industrial action. See the Introduction at 1, footnote 2.

¹⁰⁵ See above at 84.

¹⁰⁶ According to the CEACR: "In the view of the Committee, strike action is part of these activities under the provisions of Article 3; it is a collective right exercised, in the case of workers, by a group of persons who decide not to work in order to have their demands met. The right to strike is therefore considered as an activity of workers' organizations within the meaning of Article 3". General Survey 1994, *supra* note 40 at para 149.

In 1993 the CFA considered a complaint brought by the General Confederation of Workers of Peru (CGTP) against the Government of Peru alleging that certain provisions of the *Industrial Relations Act* 1992 (Peru) were in breach of the implicit right to strike within the principle of freedom of association.¹⁰⁸ Section 84(c) of the Peruvian Act outlawed the sudden halting of operations in the nerve centres of enterprise, labour slowdowns, go slow strikes or working to rule. The legal right to strike within the Act involved only the complete cessation of all work and did not encompass variations on this form of action.¹⁰⁹ The Government of Peru argued that the existence of a regulated right to strike within the Act meant that strikes “should be exercised in such a manner [the legal manner] so as not to jeopardise the right of others or the national interest”.¹¹⁰ The CFA rejected this argument, determining that restrictions upon the form of strike action that may be pursued by employees and employee organizations may only be justified where strike action ceases to be peaceful.¹¹¹

Therefore, according to ILO quasi-jurisprudence, the form that peaceful strike action takes should be a matter for the parties to determine and should not be limited by legislative prescription of the form that a valid strike should take. Provided that a strike is peaceful, parties to strike action should be able to choose the form of strike action that suits their circumstances and objectives. Restrictions on form can excessively limit the right to strike by restricting the exercise of the right to less effective or more cumbersome methods.

The Legitimate Objectives of Strikes

The reasons that participants choose to engage in strike action are complex and varied. The issue for the CFA and CEACR is to ascertain the scope of reasons for

¹⁰⁷ Ben-Israel, *supra* note 44 at 93.

¹⁰⁸ *Complaints against the Government of Peru presented by General Confederation of Workers of Peru (CGTP) et al*, Document Vol. LXXVI, 1993, Series B, No.3, Report 291, Case 1648 and 1650.

¹⁰⁹ *Ibid*, para 440.

¹¹⁰ *Ibid*, para 444.

¹¹¹ *Ibid*, para 466. Elsewhere the CFA has concluded that “restrictions on working to rule, occupations of work premises and sit down strikes can only be justified if the action ceases to be peaceful”: *Complaints against the Government of Turkey presented by the World Confederation of Labour (WLC) et al*, Document Vol. LXXI, 1988, Series B, No.3, Report 260, Case 997, 999, 1029, para 39.

engaging in strike action that constitute the legitimate exercise of the right to strike implicit in the principle of freedom of association.

Article 10 of Convention 87 specifies that the organizations to whom the Convention applies are “organizations of workers or of employers established for furthering and defending the interests of workers or of employers”. CFA and CEACR commentary provides that the right to strike will encompass strike action that is designed to further and defend the interests of workers or employers. This is a broader concept than those matters that impact on individuals through the employment relationship.

The CFA considers that the furtherance and defence of the interests of workers or employers is not confined to strikes that are aimed at securing the terms of a collective bargain. The CFA has stated that “the right to strike should not be limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement”.¹¹² Rather, the furtherance and defence of interests is a concept that extends beyond the boundaries of the employment relationship, in appropriate circumstances enabling strike action to be utilised in support of a broad range of objectives.

Strikes aimed at resolving disputes about occupational matters of concern to workers or employers generally will have legitimate objectives for the purposes of the principle of freedom of association. In considering the scope of the legitimate exercise of the right to strike, the CEACR and CFA consider that strikes with political motivations are not legitimate but strikes undertaken for sympathy or trade union purposes are legitimate.

Political Objectives

Strikes undertaken for purely political purposes do not fall within the scope of freedom of association and are outside the jurisdiction of the CFA.¹¹³

¹¹² Digest 1996, supra note 103 at para 484.

¹¹³ Digest 1996, supra note 103 at para 482; General Survey 1994, supra note 40 at para 165. As strikes of a purely political nature are not encompassed by the principle of freedom of association they fall outside the mandate of the CFA. However the CFA may consider a complaint where the actions of the Member State constitute a significant repression of trade union rights even though the strike concerned is political in nature. In 1985 the CFA considered a complaint against Chile alleging repressive

[T]he prohibition of strikes designed to coerce a government, if they are non occupational in character, does not constitute an infringement of the principles of freedom of association and strikes of a purely political nature do not fall within the scope of the principles of freedom of association.¹¹⁴

The difficulty that arises is how political strikes are differentiated from non-political strikes. Strikes that protest against the economic and social policies of a government or seek solutions to economic and social policy matters of direct concern to workers are considered to relate to occupational matters and not to be solely political in character.¹¹⁵ The difficulty is to tell political and occupationally related strikes apart when it “is often difficult to distinguish in practice between the political and occupational aspects of a strike”.¹¹⁶ The CEACR and CFA achieve the distinction in practice through untangling the motivations of those involved in strike action and recognising the legitimacy of those motivations related to occupational interests. Social and economic concerns constitute legitimate occupational motivations.

Untangling Political and Occupational Motivations

Gernigon, Odero and Guido indicate that the approach of the CFA when distinguishing between politically and occupationally motivated strikes will depend upon the actions of the participants in the strike action. Where the occupational demands expressed by the organization appear to be “merely a pretext” to disguise purely political motivations, the CFA will not usually recognise the legitimacy of

government action against trade unions after a ‘day of protest’. The CFA recalled that “[t]he rights conferred upon workers’ and employers’ organizations must be based on respect for those civil liberties which have been enunciated in particular in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights and that the absence of these civil liberties removes all meaning from the concept of trade union rights”, and heard the complaint despite the lack of direct mandate: *Complaints presented by the International Confederation of Free Trade Unions and other trade union organizations against the Government of Chile*, Document Vol. LXVIII, 1985, Series B, No. 1, Report 214, Case 1309, para 795.

¹¹⁴ *Complaint against the Government of Ecuador presented by the International Confederation of Free Trade Unions (ICFTU)*, Document Vol. LXX, 1987, Series B, No. 1, Report 248, Case 1381, para 412. This principle is echoed in many other cases, see for example: *Complaint presented by the World Confederation of Organizations of the Teaching Profession against the Government of Ethiopia*, Document Vol. LXII, 1979, Series B, No. 2, Report 194, Case 887, para 85; *Complaints against the Government of Turkey presented by the World Confederation of Labour (WLC) et al*, Document Vol. LXXI, 1988, Series B, No.3, Report 260, Case 997, 999, 1029, para 39. This conclusion is consistent with the CEACR view expressed in the 1983 General Survey *supra* note 93 that “strikes that are purely political in character do not fall within the scope of the principles of freedom of association”: at para 216.

¹¹⁵ General Survey 1994, *supra* note 40 at para 165; Digest 1996, *supra* note 103 at paras 479, 480 and 482.

¹¹⁶ General Survey 1994, *supra* note 40 at para 165.

such a strike.¹¹⁷ However, the problem often remains difficult to resolve and “there have been strikes in which the political and occupational aspects were intertwined to the extent that it was almost impossible to separate one from the other”.¹¹⁸

The difficulties of untangling political from occupational motivations are demonstrated in a complaint made to the CFA by the Antigua Workers’ Union against the Government of the United Kingdom / Antigua.¹¹⁹ At the time of the complaint, Antigua had two political parties, both formed from the ranks of trade unions, the Antigua Trades and Labour Union and the Antigua Workers Union. When either of these political parties was in power, the members of the government of the day consisted of high ranking officials from the relevant union. This led to a highly politicised labour relations system. When one of the two trade unions challenged legislation enacted by the government of the day to the CFA, the overtly political nature of the complaint could not be ignored. However, the CFA stated that “even though cases may be political in origin or present certain political aspects, they should be examined in substance if they raise questions directly concerning the exercise of trade union rights”.¹²⁰

The question of whether or not a strike is politically or occupationally motivated is a question of fact in the circumstances of any complaint. Therefore, CFA determinations can only act as guidance with respect to the conclusions that the CFA may reach in a similar case. The CFA has concluded that where strike action is intended to coerce the government of a State to accede to non-occupational demands, the strike action is political and not an exercise of the right to strike implicit in the principle of freedom of association.¹²¹ To take some very specific examples, the CFA has also concluded that the following objectives are occupational: restoration of rations of rice; restoration of democratic rights and civil liberties; cessation of attacks

¹¹⁷ Gernigon, Otero and Guido, *supra* note 103 at 15.

¹¹⁸ Ben-Israel, *supra* note 44 at 96.

¹¹⁹ *Complaint presented by the Antigua Workers’ Union against the Government of the United Kingdom / Antigua*, Document Vol. LXI, 1978, Series B, No. 3 Report 187, Case 857.

¹²⁰ *Ibid*, para 263.

¹²¹ *Complaint presented by the Ceylon Federation of Labour against the Government of Sri Lanka*, Document Vol. LXII, 1979, Series B, No. 1, Report 190, case 913, (Ceylon), para 450.

upon trade unions and cancellation of orders of dismissal; immediate grant of a wage increase and a reduction in the prices of essential commodities.¹²²

Strikes with Economic or Social Objectives

[W]orkers and their organizations should be able to express in a broader context ... their dissatisfaction as regards economic and social matters affecting their members interests.¹²³

Strikes in pursuit of economic and social objectives constitute a legitimate exercise of the right to strike implicit in the principle of freedom of association:

the [CFA] has always regarded the right to strike as constituting a fundamental right of workers and their organizations and as an essential means of *defending their economic and social interests*.¹²⁴

Accordingly, it is legitimate for workers and their organizations to strike in order to seek “solutions to economic and social policy questions and problems ... , which are of direct concern to the workers”.¹²⁵

The CFA has concluded that economic and social objectives include employment generally, social protection, the standard of living, economic policy and the minimum wage.¹²⁶ Further, the CEACR considers general protest strikes to be protected by the right to strike, particularly “where aimed at criticising a government’s economic and social policies”.¹²⁷

This extension of legitimate strike action beyond the immediate employment relationship into broader economic and social objectives is consistent with the impact that social and economic policy can have upon workers. Changes to the terms and conditions of the employment of workers at a local level may only have a limited

¹²² Ibid.

¹²³ *Complaint against the Government of Nigeria presented by the International Confederation of Free Trade Unions (ICTFU), the Organization of African Trade Union Unity (OATUU) and the World Confederation of Labour (WCL)*, Document Vol. LXXVII, 1994, Series B, No. 3, Report 295, Case 1793, para 603.

¹²⁴ *Complaints against the Government of Dominican Republic presented by the World Federation of Trade Unions (WFTU) et al*, Document Vol. LXXIV, 1991, Series B, No. 1, Report 277, Case 1549, para 441, (emphasis added).

¹²⁵ Ibid.

¹²⁶ *Complaint against the Government of Nigeria*, supra note 123, para 603; *Complaint against the Government of Ecuador*, supra note 114, para 413.

¹²⁷ General Survey, 1983, supra note 93, para 216.

effect in comparison with national and social policy. As Ben-Israel suggests, “workers interests are often determined by national economic policy, or affected by minimum standards provided by legislation”.¹²⁸ The recognition by the CFA and CEACR of the legitimacy of social and economic objectives reflects this broader perspective. Further, it is consistent with the provisions of Convention 87 whereby workers’ organizations are entitled to organise in order to further the *interests* of their workers, where workers’ *interests* are interpreted in a broad rather than narrow sense.

Strikes Undertaken in Sympathy with Other Workers (Sympathy Strikes)

A sympathy strike is a strike undertaken by workers in sympathy with or in support of workers employed by another employer (the primary dispute). The motivations of the strikers involved are not related to their own individual occupational objectives or to economic or social matters of direct effect on them. Rather, their action is aimed at resolving or influencing a dispute or policy issue affecting the occupational interests of the workers involved in a primary dispute. The disconnection between the strikers involved and the objective of the strike means that the CEACR and the CFA face difficulties establishing that the participants in the strike action have a legitimate occupational objective.¹²⁹

Nevertheless, the CEACR and the CFA consider sympathy strikes to be a legitimate exercise of the right to strike implicit in the principle of freedom of association. Both committees consider that “a *general* prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is lawful”.¹³⁰

The views of the CEACR and CFA on sympathy strikes are not explored or reasoned in detail within the CEACR Reports or CFA determinations. However, the position that workers should be able to take sympathy action accords with the principles that workers should be able to take strike action for trade union purposes and in support of

¹²⁸ Ben-Israel, *supra* note 44 at 95.

¹²⁹ Gernignon, Otero and Guido, *supra* note 103 at 16.

¹³⁰ Digest 1996, *supra* note 103 at para 486 (emphasis in original). See also General Survey 1994, *supra* note 40 at para 168 where the CEACR noted that sympathy strikes “are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centres”.

socio – economic goals. The occupational interests of other workers in a sympathy strike scenario may not always constitute a direct occupational objective, however in an indirect sense, the terms and conditions of other workers may have a significant impact upon the ability of workers to obtain their own industrial outcomes. Further, sympathy strikes may accord with the objectives of a trade union, which are considered to be a legitimate subject for strike action. It would be desirable for the CFA and CEACR to provide more analysis to support their view that sympathy strikes are a legitimate expression of the right to strike, as this is a controversial area.

Another difficulty with the CFA and CEACR commentary in this area is the uncertain status of sympathy action that takes the form of a secondary boycott. In a secondary boycott, workers unconnected to a primary dispute place pressure upon employers that are also unconnected to the primary dispute, in order to influence the outcome of that dispute. The boycott is unconnected with the direct occupational interests of the workers concerned and involves pressure against unconnected third parties. However, the secondary boycott is a sympathy strike.

Examining the issue of secondary boycotts and sympathy strikes, Creighton notes that the third edition of the *Digest of Decisions of the Committee on Freedom of Association* published in 1985 contained the CFA determination that the prohibition of secondary boycotts by law may not constitute interference with trade union rights.¹³¹ However subsequent CFA and CEACR commentary consistently notes that a general prohibition on sympathy strikes can lead to abuse, but lacks clarity with respect to the more specific issue of secondary boycotts. Novitz notes that the ILO bodies are alive to the more insidious effects that a general prohibition of sympathy strikes or secondary boycotts could have.¹³² Novitz demonstrates that the CEACR is aware, for example, of the potential for corporate restructures that have the effect of making primary boycotts into secondary boycotts, and of the possible need for international sympathy action as a result of the increasing power of multinational

¹³¹ B. Creighton, 'Freedom of Association' in R. Blanpain, (ed.) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (8th ed., Kluwer Law International: The Hague, 2004), 233 at 270.

¹³² Novitz, *supra* note 97 at 292.

corporations.¹³³ A ban on sympathy action that encompasses secondary boycotts would have a significant effect on the right to strike in these areas.

Novitz manages to explore and justify the determinations of the CFA and CEACR with respect to sympathy strikes and secondary boycotts in a way that neither body has done. There is a clear and pressing need for clear and comprehensive consideration of secondary boycotts by the ILO bodies.

Trade Union Objectives

According to CFA and CEACR quasi-jurisprudence, the pursuit of trade union objectives is a valid exercise of the right to strike implicit in the principle of freedom of association and is consistent with Article 4 of Convention 98 that requires the promotion of voluntary collective bargaining. Voluntary collective bargaining may involve disputes between workers and employers relating to trade union recognition, industrial coverage or the level at which bargaining takes place, and strike action may be a tool used in relation to this bargaining.

The CFA considers that the right to strike protects action undertaken in support of multi-employer agreements or for the purposes of trade union recognition.¹³⁴ A ban on such strikes will not be in conformity with the principle of freedom of association.¹³⁵ The CEACR considers the right to strike to be a collective right and “an activity of workers organization within the meaning of Article 3 [of Convention

¹³³ Ibid.

¹³⁴ *Complaint against the Government of New Zealand presented by the New Zealand Council of Trade Unions (NZCTU)*, Document Vol. LXXVII, 1994, Series B, No. 1, Report 292, Case 1698, para 737; Also see *Complaint against the Government of New Zealand*, supra note 42 at para 259.

¹³⁵ Digest 1996, supra note 103 at paras 487 and 488. While the recognition of trade unions for the purposes of collective bargaining is a fundamental element of the promotion of collective bargaining within Article 4 of Convention 98, this principle does not extend to the compulsory recognition of trade unions. The CEACR argues that such compulsory “intervention of this nature would alter the voluntary nature of bargaining”: CEACR Individual Observation concerning Convention 98, Right to Organise and Collective Bargaining Convention, 1949: United Kingdom, published 1991, para 3(b). Creighton argues that one of the most vexed issues facing trade unions is the refusal of employers to recognise them for the purposes of collective bargaining and that ILO instruments provide little support for the resolution of this problem. Creighton argues that Article 4 of Convention 98 and Article 3 of Convention 87 could provide a sound jurisprudential basis for a mechanism requiring compulsory recognition of trade unions for the purposes of collective bargaining - see B. Creighton, ‘The ILO and Protection of Freedom of Association in the United Kingdom’ in K. Ewing, C. Gerty and B. Hepple, (eds.) *Human Rights and Labour Law: Essays for Paul O’Higgins* (Mansell Publishing Ltd: London, 1994), 1 and Creighton, supra note 131 at 264-265.

¹³⁵ General Survey 1994, supra note 40 at para 194.

87]’.¹³⁶ The nature of the right as a collective right exercised by workers’ organizations is consistent with the interpretation that strikes in support of trade union objectives are a valid exercise of the right.

Prohibitions on Strike Action

CFA and CEACR quasi-jurisprudence permits a prohibition of strike action only in two circumstances: the general prohibition of strike action during the currency of a collective agreement or in relation to workers employed in the context of essential services or involved in the administration of the State. These are the only circumstances where a prohibition of strikes will be in accordance with the principle of freedom of association.

Strikes and Collective Bargaining

The CEACR has stated that it is legitimate to restrict the ability of organizations to strike during the currency of collective agreements provided that the parties are afforded impartial and adequate arbitration machinery in order to resolve disputes over the interpretation or application of the collective agreement.¹³⁷ Restrictions on strike action during the currency of an agreement may only relate to those rights established under the relevant collective agreement. The presence of a fixed term collective agreement should not prevent a workers’ organization from taking strike action against social and economic policy affecting the occupational interests of the members of the organization, or in relation to the future interests of the parties.¹³⁸

The construction of the principle of freedom of association in this manner reflects the willingness of the CEACR to accept the legitimacy of a ‘rights versus interests’ approach to collective agreements. The approach requires parties to use dispute resolution machinery, rather than strike action, where a dispute relates to those rights already established under the agreement. Strike action may only be used for matters

¹³⁶ Ibid.

¹³⁷ Ibid at paras 166 and 167.

¹³⁸ Ibid at para 166.

not covered under the agreement, future interests or social/economic policy concerns.¹³⁹

Work Undertaken in Essential Services

A total prohibition of strike action will also be permissible in areas where strike action is undertaken by workers in essential services and therefore would constitute a danger to the health and safety of the public. Under this approach the right to strike for an organization may be restricted or completely prohibited:

- in essential services where essential service is defined as a service, the interruption of which would endanger the life, personal safety or health of the whole or part of the population; or
- in circumstances of acute national emergency.¹⁴⁰

Essential Services

Workers, both public and private sector, in industries considered to be essential may be legitimately barred from participating in strike action.¹⁴¹ However, this only applies to workers in essential services, the interruption of which would endanger the life, personal safety or health of the whole or part of the population.¹⁴² To prevent abuse of these restrictions, the word *essential* is defined in an intentionally narrow manner requiring “the existence of a clear and imminent threat” to life, personal safety or health.¹⁴³

The CEACR considers that it is undesirable to draw up a complete and fixed list of services considered essential for the purposes of the legitimate restriction of strike action.¹⁴⁴ However the Digest of decisions of the CFA contains a list of services that

¹³⁹ Ibid at para 166; B. Creighton, ‘The Workplace Relations Act in International Perspective’ (1997) 10 *Australian Journal of Labour Law* 31 at 45. For an overview of the rights versus interests debate see C. Provis, ‘Rights Disputes v Interests Disputes: A Distinction for Australia?’ (1993) 6 *Australian Journal of Labour Law* 205.

¹⁴⁰ Digest 1996, supra note 103 at paras 526 and 527.

¹⁴¹ Swepston, supra note 38 at 188.

¹⁴² Digest 1996, supra note 103 at paras 536 and 540; General Survey 1994, supra note 40 at para 159.

¹⁴³ *Complaint against the Government of Norway presented by the Norwegian Trade Union Federation of Oil Workers (OFS)*, Document Vol. LXXIV, 1991, Series B, No. 3, Report 279, Case 1576, para 114.

¹⁴⁴ General Survey 1994, supra note 40 at para 159.

the CFA has determined, in the circumstances of particular complaints, to come within or to be excluded by the narrow view of essential services.

The following may be considered to be essential services: the hospital sector; electricity services; water supply services; telephone services; and air traffic control.¹⁴⁵ The following are not considered essential services in the strict sense of the term: radio and television; the petroleum sector; ports: loading and unloading; banking; computer services for the collection of taxes; department stores; pleasure parks; the metal and mining sectors; transport generally; refrigeration enterprises; hotel services; construction; automobile manufacturing; aircraft repairs; agricultural activities; the supply and distribution of foodstuffs; the mint and government printing; state alcohol, salt and tobacco monopolies; the education sector; and postal services.¹⁴⁶

The lists are not exhaustive or definitive. What is considered 'essential' may depend upon special circumstances that exist in one State but not in another or may change from time to time:

[A]ccount must be taken of the special circumstances existing in the various member States, since the interruption of certain services which in some countries might at worst cause economic hardship could prove disastrous in other countries and rapidly lead to conditions which might endanger the life, personal safety or health of the population.¹⁴⁷

An example of this occurred in a complaint made to the CFA against Australia.¹⁴⁸ The complainant alleged that provisions of the Australian *Workplace Relations Act* 1996 (Cth) that restrict access to legally protected strike action where the strike action threatens to cause significant damage to the Australian economy, breach the

¹⁴⁵ Digest 1996, supra note 103 at para 544.

¹⁴⁶ Ibid at para 545.

¹⁴⁷ General Survey 1994, supra note 40 at para 160.

¹⁴⁸ *Complaint against the Government of Australia presented by the International Confederation of Free Trade Unions (ICFTU), the International Transport Workers' Federation (ITF), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA)*, Document Vol LXXXIII, 2000, Series B, No. 1, Report 320, Case 1963. For discussion of this complaint see J. Murray, 'Australia in the Dock: The ILO's Decision on the Waterfront Dispute' (2000) 13 *Australian Journal of Labour Law* 167. For discussion of the dispute out of which the complaint arose see H. Trinca and A. Davies, *Waterfront: The Battle that Changed Australia* (Doubleday: Milsons Point, 2000); G. Orr, 'Conspiracy on the Waterfront' (1998) 11 *Australian Journal of Labour Law* 159.

obligation to provide a right to strike.¹⁴⁹ The CFA concluded that denial of protection to strike action that threatens to cause significant damage to the economy is not in accordance with the obligation to provide a right to strike, concluding that “economic damage is not of itself relevant”.¹⁵⁰ However, the CFA was prepared to acknowledge the argument put by the Australian Government that the stevedoring industry in Australia could constitute an essential service given that prolonged dispute could lead to an essential service crisis through blockage of all ports.¹⁵¹ The CFA concluded that it might be permissible to declare the stevedoring industry of an island nation “a public service”, justifying provisions establishing a negotiated minimum service that must be maintained in times of dispute.¹⁵²

The CFA is also alert to the potential for misrepresentation of circumstances as specific conditions that could allow the prohibition of strikes and imposition of compulsory arbitration in the context of essential services. In 1987 the Philippine employees of Nestle were engaged in strike action when the Philippine government declared the action illegal arguing that the Nestle operations were “indispensable to the national interest”.¹⁵³ The CFA concluded that “the activities carried out by this enterprise may in no way be classified as essential services in the strict sense of the term”.¹⁵⁴

Acute National Emergency

The ILO bodies consider that a general prohibition of strikes applying to **all** workers can only be justified in the event of an acute national emergency, for a limited period of time and to the extent necessary to meet the requirements of the situation.¹⁵⁵ This would be applicable in genuine crisis situations like serious conflict, insurrection or natural disaster.¹⁵⁶ The CFA has found that stoppages affecting transport companies,

¹⁴⁹ Australia, *Workplace Relations Act* 1996 (Cth), s 170MW(3).

¹⁵⁰ *Complaint against the Government of Australia*, supra note 148 at para 229.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, para 231. The CFA used the phrase ‘public service’ in the original determination and it would appear to mean a service that is not essential in the strict sense of the term, but provides an important public service.

¹⁵³ *Complaint against the Government of the Philippines presented by the Drug, Food and Allied Workers’ Federation (DFA)*, Document Vol. LXXVII, 1994, Series B, No. 3, Report 295, Case 1718, para 291.

¹⁵⁴ *Ibid.*, para 298.

¹⁵⁵ Digest 1996, supra note 103 at para 527; General Survey 1994, supra note 40 at para 153.

¹⁵⁶ General Survey 1994, supra note 40 at para 152.

railway, telecommunications or electricity, while disturbing the normal life of the community, would not normally cause an acute national emergency.¹⁵⁷

Public Servants Exercising Authority in the Name of the State

The CFA and the CEACR consider that, with respect to the right to strike in the context of government administration, only those public servants exercising authority in the name of the State can legitimately be prohibited from taking strike action.¹⁵⁸

This requires that before strike action is prohibited, an assessment of the nature of the functions carried out by public servants must be made. A prohibition based on the mere fact of employment by the State will not be legitimate and would infringe the right to strike.¹⁵⁹ Assessing when a public servant exercises authority in the name of the State may be difficult in practice and each scenario must be assessed on its own merits.¹⁶⁰ However, in CFA determinations, teachers or workers in State owned industries have not been considered to exercise authority in the name of the State, while judges and officials working in the administration of justice are considered to exercise the authority of the State.¹⁶¹

The difficulties surrounding the right to strike of persons working in court systems are illustrated by a complaint brought to the CFA against the Government of Peru.¹⁶²

Generally speaking, administrative staff managing and operating a court system do not exercise authority in the name of the State. However in this case, significant staffing reductions had led to “support and close cooperation” between administrative staff and judicial staff. The CFA concluded that the development of extremely close links with the judiciary had elevated certain administrative staff into the category of

¹⁵⁷ Digest 1996, supra note 103 at para 530.

¹⁵⁸ Digest 1996, supra note 103 at paras 534 and 535; General Survey 1994, supra note 40 at para 158. Public Servants are also covered by Convention No. 151- Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service. In addition, Article 9 of Convention 87 impacts directly upon the freedom of association exercisable by armed forces and police, providing that, “[t]he extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations”.

¹⁵⁹ Gernigon, Odero and Guido 2000, supra note 103 at 18.

¹⁶⁰ General Survey 1994, supra note 40 at para 158.

¹⁶¹ Digest 1996, supra note 40 at paras 532, 537 and 538.

¹⁶² *Complaint against the Government of Peru presented by the National Federation of Workers of the Judiciary*, Document Vol. LXXVI, 1993, Series B, No. 3, Report 291, Case 1706.

public servants exercising the authority of the State whose right to strike could be legitimately restricted.¹⁶³

If it is impossible to strictly categorise workers, the CEACR suggests a compromise solution. Strike action may be permitted on condition that a defined and limited negotiated minimum service is provided, especially if a total and prolonged stoppage could result in serious consequences for the public.¹⁶⁴

Compensatory Guarantees for the Loss of the Right to Strike.

Where a total prohibition of strikes has occurred in circumstances according with the principle of freedom of association, the CFA and the CEACR require appropriate compensatory guarantees to be made available to the workers concerned, to compensate them for the deprivation of an essential means of defending their socio-economic and occupational interests. Such guarantees should include conciliation and mediation leading to adequate, impartial and speedy arbitration procedures in the event of deadlock.¹⁶⁵ Arbitration measures applied in these situations must not only be impartial, but must appear to be impartial in order to maintain the trust and cooperation of the employees involved.¹⁶⁶

The question of appropriate compensatory guarantees for the loss of the right to strike arose in a complaint by the General Confederation of Labour of the Argentine Republic against the Government of Argentina in 1992.¹⁶⁷ Industrial unrest within the Argentine judiciary had led to the Supreme Court of Argentina issuing orders establishing a compulsory conciliation period and assuming supervisory rights, including the right to unilaterally suspend any measures in force.¹⁶⁸ The CFA concluded that, regardless of the reality of impartiality, the assumption of supervision by the Supreme Court, which was also the employer in question, lacked the requisite

¹⁶³ Ibid, para 480 and 485.

¹⁶⁴ General Survey 1994, supra note 40 at para 158.

¹⁶⁵ Digest 1996, supra note 103 at paras 546 and 547; General Survey 1994, supra note 40 at para 164.

¹⁶⁶ Digest, 1996, supra note 103 at 549.

¹⁶⁷ *Complaints against the Government of Argentina presented by the General Confederation of Labour of the Argentine Republic (CGT) and the Union of Employees of the National Judiciary*, Document Vol. LXXVI, 1993, Series B, No. 3, Report 291, Case 1653, 1660.

¹⁶⁸ Ibid, para 95.

appearance of impartiality and would not “ensure the confidence of the trade unions of the staff in the judiciary”.¹⁶⁹

Prerequisites to Undertaking Strike Action

Given the potential damage that prolonged or widespread strike action can have on a national economy, States may require the parties to a dispute to comply with prerequisites before taking strike action, aimed at facilitating the resolution of disputes. In principle, the CFA and CEACR do not object to the imposition of prerequisites to strike action provided that the requirements do not impede the lawful exercise of the right to strike:

the conditions that have to be fulfilled under the law in order to render a strike lawful should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations.¹⁷⁰

Prerequisites to strike action should not render the right to strike illusory or so onerous that strike action becomes effectively impossible.¹⁷¹ This may occur through highly technical legislation imposing onerous requirements or a requirement for the consent of the State before strike action can commence.¹⁷²

In accordance with these general principles, the CFA and the CEACR have considered the legitimacy of a range of prerequisites to strike action, discussed in turn below.

Negotiation, Conciliation and Arbitration

The right to strike may be restricted temporarily while parties exhaust negotiation, conciliation and arbitration procedures. However, binding arbitration will only be compatible with the principle of freedom of association if it is undertaken voluntarily by both parties.¹⁷³

¹⁶⁹ Ibid, para 109.

¹⁷⁰ Digest 1996, supra note 103 at para 498.

¹⁷¹ *Complaint against the Government of Peru presented by the Intersectoral Confederation of State Workers (CITE) et al*, Document Vol. LXXIV, 1991, Series B, No. 3, Report 279, Case 1566, para 89.

¹⁷² Ibid.

¹⁷³ The Digest, 1996, supra note 103 at paras 500 and 501.

With respect to the issue of compulsory arbitration, the CEACR considers that imposing non consensual binding arbitration on parties to a dispute would be incompatible with the principle of voluntary collective bargaining established in Article 4 of Convention 98.¹⁷⁴ The CFA considers that a provision which permits “either party unilaterally to request the intervention of the labour authority may effectively undermine the right of workers to call a strike ... and does not promote voluntary collective bargaining”.¹⁷⁵ These determinations indicate that the decision to undertake strike action should not be prevented by the imposition of compulsory conciliation and arbitration proceedings either unilaterally by one of the parties to the dispute, or by the State.

Despite this general approach, the CEACR concedes that compulsory arbitration may be a last resort answer, where parties are engaged in protracted and fruitless negotiations. However:

[i]n the Committee’s opinion, it would be highly advisable that the parties be given *every* opportunity to bargain collectively, during a *sufficient period*, with the help of *independent* facilitators (mediator, conciliator, etc.) and machinery and procedures designed with the foremost objective of facilitating collective bargaining. Based on the premise that a negotiated agreement, however unsatisfactory, is to be preferred to an imposed solution, the parties should always retain the option of returning voluntarily to the bargaining table, which implies that whatever disputes settlement mechanism is adopted should incorporate the possibility of suspending the compulsory arbitration process, if the parties want to resume negotiations.¹⁷⁶

Strike Ballots

A common prerequisite to undertaking strike action is a strike ballot and this requirement is acceptable to both the CFA and CEACR.¹⁷⁷ The ballot method, quorum and majority required should not make the exercise of strike very difficult or impossible in practice.¹⁷⁸ Each strike ballot must be assessed on its own merits in order to ensure that it does not unduly restrict the exercise of the right to strike. Guidance on the appropriate use of strike ballots can be found through determinations of the CFA.

¹⁷⁴ General Survey 1994, *supra* note 40 at para 258.

¹⁷⁵ *Complaint against the Government of Peru presented by the World Federation of Trade Unions (WFTU)*, Document Vol. LXXII, 1989, Series B, No. 2, Report 265, Case 1478, 1484, para 547.

¹⁷⁶ General Survey 1994, para 259, *Italics in original*.

¹⁷⁷ Digest 1996, para. 503; General Survey 1994, para 170.

Secret Ballots

The CFA considers that an obligation to make a strike decision by secret ballot is acceptable, that secret ballots are a reasonable requirement and do not hinder the exercise of the right to strike.¹⁷⁹

Second Strike Vote

The obligation to take a second strike vote after the lapse of a set time is regarded as being in accordance with the right to strike provided that it is not unreasonable or unduly onerous and is not required within a short time after the initial ballot.¹⁸⁰ In a complaint against the Canadian government made by the Canadian Labour Congress, the CFA held that an obligation to hold a second strike ballot, if a strike had not taken place within 3 months of the first vote, did not constitute an infringement of the principle of freedom of association.¹⁸¹ The CFA considered that the second ballot allowed parties to reconsider their decision in the event of a lengthy delay.¹⁸²

Absolute Majority

The CFA considers that a requirements of a ballot requiring an absolute majority (a majority of all eligible voters not just those who actually vote) could excessively limit the right to strike, hindering the ability of parties to strike at all.¹⁸³ The CFA has noted that while an absolute majority would be more accurate in ascertaining the views of all workers concerned, a lesser "requirement of a majority of those voting would undoubtedly lessen the risk of obstacles to calling a strike".¹⁸⁴

The issue of majority has been brought to the CFA on a number of occasions, in which the CFA has consistently concluded that requirements for absolute majorities

¹⁷⁸ General Survey 1994, para 170.

¹⁷⁹ *Complaint against the Government of Fiji presented by the International Confederation of Free Trade Unions (ICFTU) and the Public Services International (PSI)*, Document Vol. LXXV, 1992, Series B, No. 3, Report 284, Case 1622, para 700.

¹⁸⁰ *Complaint against the Government of Canada (British Columbia) presented by the Canadian Labour Congress*, Document Vol. LXXI, 1988, Series B, No. 2, Report 256, Case 1430, para 191.

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ Digest 1996, *supra* note 103 at paras 507 and 508.

¹⁸⁴ *Complaint presented by the International Confederation of Free Trade Unions and the World Confederation of Labour against the Government of Poland*, Document Vol. LXV, 1982, Series B, No. 3, Report 221, Case 1097, para 83.

or two-thirds majorities excessively hinder the right to strike.¹⁸⁵ However, these complaints have largely been in the context of industry wide bargaining or large trade unions. In consequence, the conclusions of the CFA are punctuated with the phrases “in particular where trade unions have large numbers of members or cover a large area”,¹⁸⁶ “particularly in the case of a trade union having a large number of members”,¹⁸⁷ and “in the case of large undertakings”.¹⁸⁸ It remains unclear if a requirement of an absolute majority in a dispute involving an enterprise based trade union would be unduly restrictive given that there are significantly fewer obstacles to achieving an absolute majority.

Notice Provisions

The requirement of a notice period before strike action can be taken, so far as it is designed to encourage parties to engage in final negotiation before resorting to strike action, is not regarded as contrary to the principle of freedom of association. A requirement of notice should not operate as an obstacle to bargaining and should not, in practice, amount to a situation where workers simply wait “for its expiry in order to be able to exercise their right to strike”.¹⁸⁹

Where resort to strike action is permitted within essential services or for public servants exercising the authority of the State, it will be consistent with the principle of freedom of association to impose a lengthy notice requirement. The CFA has concluded that where an interruption to service could endanger the life, personal safety or health of a whole or part of the population, the imposition of longer notice periods will be acceptable.¹⁹⁰ A cooling off period of 40 days in the public sector,¹⁹¹

¹⁸⁵ For example see *Complaints presented by the International Confederation of Free Trade Unions, the Federation of Peruvian Light and Power Workers and Various other Trade Union Organizations against the Government of Peru*, Document Vol. LXV, 1982, Series B, No. 1, Report 214, Case 1081, para 266; *Complaints presented by the National Labour Front, et al against the Government of Brazil*, Document Vol. LXII, 1979, Series B, No. 3, Report 197, Case 927, para 355.

¹⁸⁶ *Complaint against the Government of Brazil*, supra note 185, para 355.

¹⁸⁷ *Complaints presented by the International Confederation of Free Trade Unions, et al against the Government of Chile*, Document Vol. LXII, 1979, Series B, No. 3, Report 197, Case 823, para 414.

¹⁸⁸ *Complaint against the Government of Poland*, supra note 184 at para 83.

¹⁸⁹ General Survey 1994, supra note 40 at para 172.

¹⁹⁰ *Complaint against the Government of Peru*, supra note 171 at para 86.

¹⁹¹ *Complaint against the Government of Canada*, supra note 181 at para 186.

and a 20 day notice period for services of social or public interest,¹⁹² were held to be in accordance with the principles of freedom of association.

Responsibility for Determining that Prerequisites Have Not Been Met or Declaring a Strike Unlawful

According to the CFA, where reasonable prerequisites exist for the taking of lawful strike action, the responsibility for determining whether or not those prerequisites have been met must be located within an impartial independent authority and “responsibility for declaring a strike illegal should not lie with the government but with an independent body, such as the courts”.¹⁹³

The arbiter of whether strike prerequisites have been met should never be the employer concerned due to the inherent conflict of interest involved.¹⁹⁴ Further, a government should never be the arbiter for its own employees.¹⁹⁵ A government should also refrain from resolving disputes relating to non-governmental employees due to the potential pressure of public opinion seeking the speedy resolution of the dispute on a Government.

Examples of circumstances where the CFA has held that the vesting of arbitral power has occurred inappropriately are the heads of public institutions for Peruvian civil

¹⁹² *Complaint against the Government of Ecuador presented by the Confederation of Workers of Ecuador (CTE), the Ecuadorian Confederation of Free Trade Union Organizations (CEOSL) and the Latin American Central of Workers (CLAT)*, Document Vol. LXXVI, 1993, Series B, No. 2, Report 287, Case 1617, para 61.

¹⁹³ *Complaint against the Government of Peru presented by the World Confederation of Organizations of the Teaching Profession (WCOTP)*, Document Vol. LXXV, 1992, Series B, No. 1, Report 281, Case 1598, para 477; *Complaint against the Government of Nicaragua presented by the Sandinista Workers' Confederation (CST) and the National Union of Workers (UNE)*, Document Vol. LXXV, 1992, Series B, No. 3, Report 284, Case 1586, para 934; *Complaint against the Government of Argentina presented by the General Confederation of Labour (CGT), et al*, Document Vol. LXXVII, 1994, Series B, No. 1, Report 292, Case 1679, para 95.

¹⁹⁴ *Complaints presented by the International Confederation of Free Trade Unions, et al*, Document Vol. LXVIII, 1985, Series B, No. 2, Report 239, Case 1190, para 235: “The unlawful nature of a strike should be determined by a judicial authority and not an administrative authority, and must not be declared by the employer, who would thus be playing the role of judge and party to the dispute”.

¹⁹⁵ *Complaint against the Government of Nicaragua*, supra note 193 at para 934; *Complaint against the Government of Argentina*, supra note 193 at para 95.

servants,¹⁹⁶ the Government for Peruvian teachers¹⁹⁷ and the administrative authorities for Coast Rican public servants.¹⁹⁸

The Course of the Strike

In CEACR and CFA quasi-jurisprudence, government intervention designed to end a lawful strike will be contrary to the principle of freedom of association unless interference is only exercised when the life, health or personal safety of the population might be endangered.¹⁹⁹ In this context the CFA has concluded that back to work or requisition orders, the hiring of replacement workers or use of military workers in order to break a strike, or the intervention of the police or military are in contravention of the right to strike as implied from the principle of freedom of association.²⁰⁰

Three areas relating to government intervention in the course of a strike that have been considered more specifically by the CFA in this context include the hiring of replacement workers, the use of the police or military to restore 'public order' and the concept of peaceful picketing. These contentious areas will be explored in further detail.

The Hiring of Replacement Workers by Employers

A difficult question faced by the CFA is whether it will be legitimate or not for employers to hire replacement workers during the course of a strike to maintain the functions of their business. This would not deny the right of workers to strike, but would undermine the impact of strike action.

The CFA has stated that "the hiring of workers to break a strike in a sector ... which cannot be regarded as essential .. constitutes a serious violation of freedom of

¹⁹⁶ Ibid.

¹⁹⁷ *Complaint against the Government of Peru*, supra note 193.

¹⁹⁸ *Representation made by the Confederation of Costa Rican Workers (CTC), et al*, Document Vol. LXVIII, 1985, Series B, No. 2, Report 240, Case 1304, para 96.

¹⁹⁹ Digest 1996, supra note 103 at para 572.

²⁰⁰ Ibid at paras 573 and 574.

association”.²⁰¹ However, the use of non striking pre-existing workers is not in violation of the principle of freedom of association.²⁰² Equally, it will be legitimate to use replacement workers during strike action provided that their use does not threaten the ability of the striking workers to pursue their interests through strike action and is not designed to break the strike.²⁰³ The conclusions suggest that the State must take steps to ban the hiring of replacement workers by employers, in order to ensure that the exercise of the right to strike is not hindered. This is supported by CEACR commentary:

A special problem arises when legislation or practice allows enterprises to recruit workers to replace their own employees on *legal* strike The Committee considers that this type of provision or practice seriously impairs the right to strike and affects the free exercise of trade union rights.²⁰⁴

In a complaint against the Government of Malta brought by the International Federation of Free Teachers' Unions,²⁰⁵ it was alleged that the Maltese Government had directed members of the police force to instruct pupils during the course of a teacher's strike.²⁰⁶ However, it subsequently transpired that the police force had given a limited number of talks on matters unrelated to school curriculum, and had organised visits for the school children to see displays of police dogs.²⁰⁷ The CFA concluded that the police force had not affected the exercise of the right to strike by the teachers or the ability of the teachers to pursue their interests through strike action.²⁰⁸

²⁰¹ *Complaint presented by the Local Federation of Trade Unions of Casablanca (Moroccan Federation of Labour against the Government of Morocco)*, Document Vol. LXVIII, 1985, Series B, No. 3, Report 241, Case 1282, para 419.

²⁰² *Complaints presented by the United Trade Unions of Casablanca (Moroccan Union of Labour) against the Government of Morocco*, Document Vol. LXV, 1982, Series B, No. 1, Report 214, Case 992 and 1018, para 91.

²⁰³ *Complaint presented by the International Federation of Free Teachers' Unions and the World Confederation of Organizations of the Teaching Profession against the Government of Malta*, Document Vol. LXIII, 1980, Series B, No. 2, Report 202, Case 949.

²⁰⁴ General Survey 1994, *supra* note 40 at para 175. The issue of employers' using replacement labour is also discussed by Novitz who points out that the CFA has, on occasion, requested States to repeal national legislation that permits the hiring of replacement workers. See Novitz, *supra* note 97 at 319. However, the difficulty with both the CEACR and CFA commentary is that it does not address the issue of whether or not a State is expected to ban the practice of hiring replacement workers when such action is possible without specific enabling legislation. The logic of the commentary of both the CFA and CEACR suggests that this is the case although neither body has specifically made this point.

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*, para 266.

²⁰⁷ *Ibid.*, para 279.

The conclusions of the CFA demonstrate the existence of a tension between the principle of freedom of association and the consequences of the full expression of the principle for the broader society. The conclusion that employers cannot replace striking workers exercising their legitimate right to strike endorses the argument that the rights of others within the community must, at times, give way to the exercise of the principle of freedom of association. The ability to pursue the right to strike is placed before an employer's right to hire workers and the right of individuals to seek temporary employment from an employer during the course of a strike.

The Use of the Police or Military to Restore 'Public Order'

It is further argued by the CFA that the use of police or of the military to intervene in lawful strike action is contrary to the implicit right to strike in the principle of freedom of association. The CFA has stated that "intervention by security forces in a strike should be strictly limited to the maintenance of public order",²⁰⁹ and States should only resort to the use of force where "grave situations arise and public order is seriously threatened".²¹⁰ Where force is necessary to maintain public order, such force should be in proportion to the threat posed and should avoid any use of violence.²¹¹

In practice, the concept of 'public order' may prove open to interpretation. In a complaint made by the International Confederation of Free Trade Unions against the Government of Iran, the CFA faced difficulties assessing whether there had been a threat to public order due to the differences evident in the parties' written submissions.²¹² The complainant alleged that during strike action by factory workers "five units from the Prosecutor's Office, accompanied by armed guards, arrived at the site and, while continuously firing into the air, they wounded, beat and arrested the workers".²¹³ In response the Iranian Government alleged that the strikers were a

²⁰⁸ Ibid, paras 279-280.

²⁰⁹ *Complaint presented by the Centre of Indian Trade Unions against the Government of India*, Document Vol. LXVII, 1984, Series B, No. 2, Report 234, Case 1227, para 309; *Complaint presented by the International Confederation of Free Trade Unions against the Government of Iran*, Document Vol. LXVI, 1983, Series B, No. 3, Report 230, Case 1187, para 674.

²¹⁰ *Complaint against the Government of Morocco presented by the Moroccan Labour Union*, Document Vol. LXXVII, 1994, Series B, No. 2, Report 294, Case 1724, para 368.

²¹¹ *Complaint against the Government of Peru presented by the General Confederation of Peruvian Workers (GCTP)*, Document Vol. LXXIV, 1991, Series B, No. 2, Report 278, Case 1541, para 255.

²¹² *Complaint against the Government of Iran*, supra note 209.

²¹³ Ibid, para 663.

“group of terrorists ... [that] intended to close the factory and prevent production by creating a disturbance”.²¹⁴ In the absence of conclusive evidence to support either version of events, the CFA was unable to make a definitive conclusion.²¹⁵ Another complaint against the Government of India alleged that “a large contingent of state police broke up the sit-in strike, confiscated the strikers’ property and arrested about 60 people”.²¹⁶ However, in response the Indian Government argued that “the police were called only to ensure the maintenance of law and order and was [sic] withdrawn as soon as the situation returned to normal”.²¹⁷

The main difficulty with the concept of public order is the need for interpretation and establishment of what will actually constitute a threat to the public order. Actions considered to constitute a ‘peaceful strike’ by workers organizations’ may be viewed as a ‘serious threat to law and order’ by the relevant authorities. This can create significant evidentiary difficulties for the CFA and make it difficult to ascertain whether or not there has been a violation of the principle of freedom of association.

Peaceful Picketing

A general principle established by the CFA is that a strike should not of itself create unlawfulness and those actions that are lawful outside the context of strikes should remain lawful during strike action. This applies equally to unlawful behaviour.²¹⁸ Strike action involving picketing commonly faces difficulties in this context. A picket involving otherwise lawful conduct should not be rendered unlawful merely due to the fact of picketing:

[t]aking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work.²¹⁹

²¹⁴ Ibid, para 667.

²¹⁵ Ibid, para 674.

²¹⁶ *Complaint against the Government of India*, supra note 209 at para 303.

²¹⁷ Ibid, para 309.

²¹⁸ In this context, the CFA has concluded that striking employees who resort to violence and the commission of criminal acts are not protected by the principles of freedom of association with respect to those violent or criminal actions: *Complaint against the Government of Nicaragua presented by the Sandinista Workers’ Confederation (CST) and the Agricultural Workers’ Association (ATC)*, Document Vol. LXXVII, 1994, Series B, No. 2, Report 294, case 1719, para 668.

²¹⁹ Digest 1996, supra note 103 at para 586.

In carrying out a picket, picketers should behave lawfully, conform to the principle of freedom of association, and not interfere with the freedom of others to associate. In a complaint made against the Government of Morocco concerning the operation of a picket line, the CFA determined that action opposing the recruitment of outside labour to break a picket was acceptable, but action interfering with the rights of existing employees to attend work did not attract protection under the principle of freedom of association.²²⁰

The Repercussions of Strike Action

The right to strike may be rendered meaningless if participation in strike action attracts repercussions that make it non-viable as a tool of collective bargaining. This section will consider the possible repercussions of strike action and CFA and CEACR opinions as to whether such repercussions violate the implicit right to strike in the principle of freedom of association.

Legal Sanctions

According to the CFA, “no one should be penalised for carrying out or attempting to carry out a legitimate strike”.²²¹ Therefore, sanctions for strike action should only be imposed on strike action where the initial prohibitions are in conformity with the principle of freedom of association.²²² In consideration of a complaint made to the CFA concerning the status of the common law in Australia whereby a strike will constitute a breach of the employment contract attracting possible civil liability in contract or tort, the CFA concluded:

[t]he Committee could not view with equanimity a set of legal rules which: (i) appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein; (ii) makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequence of their actions; and (iii) enables an employer faced with such action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct. The cumulative effect of such provisions could be to deprive workers of the capacity lawfully

²²⁰ *Complaint presented by the United Trade Unions of Casablanca against the Government of Morocco*, Document Vol. LXV, 1982, Series B, No. 1, Report 214, Case 1017, paras 101-104.

²²¹ Digest 1996, *supra* note 103 at para 590.

²²² General Survey 1994, *supra* note 40 at para 177.

to take strike action to promote and defend their economic and social interests.²²³

If lawful strike action attracts civil or criminal sanctions, the implicit right to strike is violated. This can also occur if overly harsh sanctions are applied to unlawful strike action. Unlawful strikes may occur for a variety of reasons relating to the working conditions or the legal framework of a particular State. Where unlawful strikes occur, the sanction applied in response should be reasonable: “all penalties in respect of illegitimate actions linked to strikes should be proportionate to the offence committed”.²²⁴ Further, to maintain harmony in industrial relations “the authorities should not resort to arrests and imprisonment in connection with the organization of or participation in a peaceful strike ... [S]uch measures entail serious risks of abuse and a serious threat to freedom of association”.²²⁵

Dismissals

One possible repercussion of exercising the right to strike is dismissal. The deprivation of employment is a significant potential sanction attaching to strike action and can operate as a powerful disincentive to striking. The possibility for serious curtailment of the right to strike through the mass dismissal of workers leads the CFA to conclude that “the dismissal of [workers] because of a strike, which is a lawful trade union activity, constitutes serious discrimination in employment and is contrary to Convention No 98”.²²⁶ Furthermore, the CFA considers that a large number of

²²³ *Complaint against the Government of Australia presented by the International Federation of Air Line Pilots Associations (IFALPA)*, Document Vol. LXXIV, 1991, Series B, No. 1, Report 277, Case 1511. For discussion of the CFA conclusions in this complaint see K. McEvoy and R. Owens, ‘On a Wing and a Prayer: The Pilots Dispute in the International Context’ (1993) 6 *Australian Journal of Labour Law* 1.

²²⁴ *Complaints against the Government of Morocco presented by the International Miners’ Organization (IMO), the Organization of African Trade Unity (OATUU) and the Democratic Federation of Labour (CDT)*, Document Vol. LXXII, 1989, Series B, No. 2, Report 265, Case 1490, para 239.

²²⁵ *Complaints against the Government of Morocco presented by the Democratic Confederation of Labour (CDT), et al*, Document Vol. LXXV, 1992, Series B, No. 1, Report 281, Case 1574, para 221.

²²⁶ *Complaint presented by the World Confederation of Organizations of the Teaching Profession against the Government of Honduras*, Document Vol. LXVIII, 1985, Series B, No. 2, Report 239, Case 1271, para 274.

dismissals during a labour dispute “involves serious risks of abuse and a serious threat to freedom of association”.²²⁷

The conclusions of the CFA with respect to complaints concerning dismissals provide a guide for application of the principle in practice:

- workers should not be dismissed or refused re-employment on account of having participated in a strike and it is irrelevant whether such dismissal occurs in advance, during or after a strike;²²⁸
- the dismissal of employees present during a failed strike ballot constituted a sanction for attempting to carry out lawful strike action;²²⁹
- the dismissal of 17 workers after an unlawful 6 hour sit down strike was not a proportionate response, demonstrated an inflexible attitude and threatened the principle of freedom of association;²³⁰ and
- the principle of freedom of association cannot be avoided by manipulating circumstances so as to separate the fact of the strike from the fact of the dismissals; in such cases, if the strike was the cause of the dismissal then it will be in breach of the principle of freedom of association, irrespective of an attempt on the part of the employer to attribute the dismissal to another cause.²³¹

²²⁷ *Complaint presented by the National Union of Workers in the Construction, Wood and Building Materials Industries against the Government of Costa Rica*, Document Vol. LXIII, 1980, Series B, No. 3, Report 204, Case 982, para 369.

²²⁸ Digest 1996, supra note 103 at para 593. In response to a complaint made to the CFA, the Government of the United Kingdom argued that it was not impermissible to dismiss workers **during** a strike because the wording of CFA conclusions provided that workers were “not to be dismissed after the conclusion of a strike”. The CFA held that this view was fallacious and could not be sustained: *Complaint against the Government of the United Kingdom presented by the National Union of Seamen (NUS)*, Document Vol. LXXIV, 1994, Series B, No. 1, Report 277, Case 1540, para 90.

²²⁹ *Complaint against the Government of Turkey presented by the International Federation of Air Line Pilots Associations (IFALPA)*, Document Vol. LXXVII, 1994, Series B, No. 3, Report 295, Case 1755, para 343.

²³⁰ *Complaint presented by the Single Union of Employees of Scala (SUTS) against the Government of Peru*, Document Vol. LXIII, 1980, Series B, No. 3, Report 204, Case 960, para 291.

²³¹ An example of this occurred in a complaint presented against Chile where the dismissal of workers occurred after strike action had taken place and was put down to an unrelated cause by the Chilean Government. The CFA concluded that “these measures [the dismissals] came very shortly after action had been undertaken by trade union organizations in support of their claims, and in particular after a fairly protracted strike ... there is reason to conclude that they (the employees) have been penalised for their trade union activity”: *Complaints presented by the International Confederation of Free Trade Unions, et al, against the Government of Chile*, Document Vol. LXV, 1982, Series B, No. 2, Report 217, Case 823, para 510.

Payment for Periods of Strike Action

It is not contrary to the principle of freedom of association for employers to deduct wages for days that employees did not work due to industrial action, because it neither prevents nor undermines the right of workers to strike.²³² Any reduction in wages must be commensurate with the period of time that was not worked.²³³ In a complaint against the Government of India, the CFA concluded that pay deductions that were higher than the amount corresponding to the period of the strike were “not conducive to harmonious labour relations”.²³⁴ The withholding of non commensurate wages constitutes the imposition of a penalty, just as forcing an employer to pay an employee during a strike would penalise an employer. The substance of labour negotiations is concerned with finding a solution to a common problem, not penalising parties for their use of legitimate bargaining tactics.

The above discussion relates to the compulsory payment or withholding of wages for periods of strike action. The CEACR has stated that parties to collective bargaining should be free to negotiate the terms of their collective bargains and to include payments by employers to employees for periods of strike action in the terms of their agreement. The CEACR considers that a restriction on this ability excessively limits the subject matter of a strike.²³⁵

Protection Against Anti -Union Discrimination for Engaging in Strike Action

According to the CEACR and CFA, Article 1 of Convention 98 protects workers against discrimination for engaging in trade union activities. This extends to protection against discrimination for engaging in strike action at the time of recruitment, the period of employment and at termination.²³⁶ The protection extends

²³² Digest 1996, supra note 103 at para 588.

²³³ *Complaint against the Government of India presented by the Centre of Indian Trade Unions*, Document Vol. LXXV, Series B, No. 2, Report 283, Case 1479, para 99.

²³⁴ Ibid.

²³⁵ CEACR Individual Observations concerning Convention 87 Freedom of Association and Protection of the Right to Organise Convention, 1948: Australia, published 1998 and 2000.

²³⁶ General Survey 1994, supra note 40 at para 210. The protection against acts of anti-union discrimination has also been expressed in other Conventions. In particular the Workers' Representatives Convention, 1971 No. 135, Article 1 provides that: “workers’ representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers’ representative or on union membership or participation

to any actions which may prejudice a worker or union official in their employment including relocation, demotion and deprivation or restrictions of all kinds, for example, remuneration, vocational training or social benefits.²³⁷

The CEACR considers that it is necessary to provide legislative machinery to protect against anti-union discrimination. General prohibitions will not be sufficient unless they are accompanied by effective and rapid procedures to ensure their application in practice.²³⁸ If discrimination is substantiated, compensation for the prejudice suffered by the worker as a result of the anti-union discrimination should be available.

Reinstatement of the worker with back payment of unpaid wages and maintenance of acquired rights constitutes the best compensatory solution.²³⁹ Where the only remedy available for an act of anti-union discrimination is damages, the CEACR considers this to be an inadequate remedy:

[L]egislation which allows the employer in practice to terminate the employment of a worker on condition that he pay compensation provided for by law in all cases of unjustified dismissal, when the real motive is his trade union membership or activity, is inadequate under the terms of Article 1 of the Convention, the most appropriate measure being reinstatement.²⁴⁰

Furthermore, where reinstatement is impossible, compensation for anti-union dismissal should be higher than that prescribed for other kinds of dismissal.²⁴¹

Conclusion

The right to strike within the ILO operates as an implicit component of the principle of freedom of association, enshrined in the Constitution of the ILO, the Fundamental Declaration and the freedom of association Conventions. Member States of the ILO are committed to observe and implement the right to strike by virtue of their membership of the ILO and commitment to the principle of freedom of association, irrespective of ratification of the relevant Conventions.

in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements”.

²³⁷ General Survey 1994, supra note 40 at para 212.

²³⁸ Ibid, para 214.

²³⁹ Ibid, para 219.

²⁴⁰ Ibid, para 220.

²⁴¹ Ibid, para 221.

The ILO has the most developed and sophisticated system of supervision of standards in the international human rights system. Despite the absence of express enforcement mechanisms, the operation of the supervision system provides detailed information about the ratification and compliance status of all Member States and operates as an effective international publication device where States are recalcitrant in their non-compliance with obligations. The recommendations of the CEACR and the determinations of the CFA operate together to provide a detailed and comprehensive guide to the content of the right to strike implicit in the principle of freedom of association. While not formally binding, these principles make up the most authoritative and comprehensive set of principles on the right to strike in international law.

The quasi-jurisprudence of the ILO on the implicit right to strike reflects a common sense approach to the application of the right in practice. Restrictions and procedures governing the exercise of the right are considered to be appropriate. Provisions are measured according to a guiding principle whereby impediments to exercising the right to strike are legitimate provided that they do not place undue obstacles in the way of the exercise of the right. The whole body of quasi-jurisprudence can be viewed in the light that parties should be able to voluntarily bargain and workers should be able to take strike action as a weapon in that process.

Chapter Four

What is the Right to Strike in International Law?

Introduction

Chapters 1-3 comprehensively examined the various sources of international law on the right to strike. This chapter identifies general characteristics of that international law, and in particular of the right to strike contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and ILO standards which bind Australia.

The Right to Strike in International Law

A Functional Right to Strike

The right to strike in international law is functional in nature, operating as an element of the principle of freedom of association. The right to strike serves the function of ensuring that freedom of association is not merely a right of assembly. While freedom of association may be constructed as a freedom belonging to individuals, enabling them to join together and associate with other individuals, the right to strike is a right belonging to the collective. Where freedom of association is exercised in an industrial relations context, it has an extremely limited role unless it is supplemented by the right of workers to bargain collectively and to strike in order to facilitate equalisation of power within the employment relationship.¹

There is no example, under the instruments considered, of an express enactment or implicit right to strike outside the principle of freedom of association expressed in the context of economic/social rights. In the European instruments, only the economic/social rights enactment of freedom of association within the European Social Convention (ESC) contains an express statement of the right to strike. The

¹ Vranken writes, "strike qualifies as an essentially collective right. As such the right to strike constitutes a necessary correlation to collective bargaining. Without at least the potential of a collective refusal to work, the workers would effectively not be able to bargain collectively": M. Vranken, 'Strike

civil/political enactment of freedom of association in the European Convention on Human Rights (ECHR) does not. This pattern is also found in the terms and interpretation of the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR. ILO instruments were enacted as 'worker' or economic/social rights and contain an implicit right to strike. Accordingly the right to strike in the instruments under review is functional, serving the purposes of the social/economic approach to freedom of association but not the civil/political version. The civil/political approach to freedom of association does not serve the purpose of trade union association even where the right to join a trade union is expressly mentioned.² It is suggested that there is no fundamental or inherent right to strike in international law. The right is only found within the functional construction of the principle of freedom of association, when enacted in the context of social/economic rights.

It may be argued that this conclusion that the right to strike operates only as a functional right is incorrect, because the right to strike operates as an express right within the ICESCR and the ESC and therefore has an independent existence.

However, the expression of the right in these instruments is enacted in the context of an elaboration of the principle of freedom of association in the industrial relations or economic/social rights context. Both instruments articulate the right to strike within generalist articles that elaborate trade union rights stemming from the principle of freedom of association. For example, the right to strike in the ICESCR appears in article 8(1)(d) after the specific enactment of the right to form and join trade unions, the right of trade unions to establish confederations and the right of trade unions to function freely, which are specific rights flowing from the primary freedom to associate. Rather than operating as expressions of an independent right to strike, these instruments demonstrate the connection between freedom of association and the right to strike, further underlining the functional nature of the right to strike.

and the Individual Employment Contract: The New Zealand Case' (1989) 19 *Victoria University of Wellington Law Review* 249 at 264.

² The expression of freedom of association in ICCPR Article 22 includes "the right to form and join trade unions for the protection of his interests". The same wording is found in Article 11 of the ECHR. However in both instances the principle of freedom of association has been held not to encompass the right to collective bargaining or the right to strike – see the discussion in chapter 1.

A Right to Strike in Customary International Law?

In generalising about the nature of the right to strike in international law, it is appropriate to touch upon customary international law; as Australia will be bound by the right to strike in international law if customary international law encompasses the right to strike. Commentators suggest that the right to strike has not achieved the degree of State acceptance and practice necessary to constitute a principle of customary international law.³ In Australia it was held by the High Court in *Victoria v Commonwealth* that the right to strike has not attained the status of customary international law.⁴ The court by majority stated that customary international law requires consistency of State practice and acceptance by States that they are so bound, and it could find no basis for the existence of a right to strike on those grounds.⁵ While the decision of a national court does not effect the existence of the right within international law, the holding does suggest two things. First, customary international law requires acceptance by States that they are 'so bound' and Australia has not demonstrated this acceptance. Second, Australian courts are bound by this holding of the High Court and thus the Australian legal position on this point is clear unless or until a legislative or common law change occurs.

Construction of Freedom of association

Freedom of association is either constructed as an individual or collective freedom depending upon whether it is viewed through the prism of civil/political or economic/social rights. When viewed through the prism of civil/political rights, it is considered to constitute a limited individualist freedom to do in association that which can be done independently. As striking is a collective activity, it cannot be encompassed within this view of freedom of association. However, when viewed from the economic/social perspective, freedom of association constitutes a collective freedom encompassing the right to bargain collectively and the right to strike.

³ See P. Alston, 'Labor Rights Provisions in U.S. Trade Law - Aggressive Unilateralism?' in L. Compa and S. Diamond, (eds.) *Human Rights, Labor Rights and International Trade* (University of Pennsylvania Press: Philadelphia, 1996), 71 at 79; R. Birk, 'Derogations and Restrictions on the Right To Strike Under International Law' in R. Blanpain, (ed.) *Labour Law, Human Rights and Social Justice* (Kluwer Law International: The Hague, 2001), 95 at 96.

⁴ *Victoria v Commonwealth* (1996) 187 CLR 416.

The division in international law between civil/political and economic/social rights is outdated but is reflected within European instruments and the ICCPR and ICESCR. While an increasing number of authors reject the division, the current pre-eminence of the individualist contractualist approach to labour regulation in many Western jurisdictions means that a significant change to the enactments of international law is unlikely in the near future.⁶ Nonetheless, the collectivist construction of freedom of association within the social/economic rights is a legitimate accepted principle within international law and binding upon Australia through its ratification of the ICESCR and ILO Conventions 87 *The Freedom of Association and Protection of the Right to Organise Convention*, 1948 and 98 *The Right to Organise and Collective Bargaining Convention*, 1949 (the Freedom of Association Conventions). The ongoing presence of the division does not detract from Australia's existing obligations in international law.

The Right to Strike in the ICESCR and ILO Standards

The concept of industrial action is not one with a single meaning that holds at all times, for every purpose and in every stage of development of labour relations and labour law.⁷

This statement touches upon the difficulties involved in adapting and implementing international labour standards with respect to the principle of freedom of association, collective bargaining and the right to strike. Strike action is not prone to simplistic or universally applicable definitions. Strike action within different labour law systems, stages of development and historical periods can fulfil differing purposes and ideological positions. The task of the drafters of the ICESCR and ILO Freedom of Association Conventions was a demanding one, especially given the need to implement standards that would pass the twin tests of time and universality of application.

⁵ Ibid at 546 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ.

⁶ The contractualist climate is explored within G. Anderson, 'Implementing Collective Bargaining Policy through the Restriction of the Right to Strike' in R. Mitchell and J. Min Aun Wu, (eds.) *Facing the Challenge in the Asia Pacific Region: Contemporary Themes and Issues in Labour law* (Occasional Monograph No. 5, Centre for Employment and Labour Relations Law, University of Melbourne: Parkville, 1997) at 157; and within chapter 7 at 240-243.

ILO Instruments and the ICESCR Reflect their Era of Promulgation

While every effort at universality was made, ILO Conventions and the ICESCR are products of the era in which they were promulgated. The ILO Freedom of Association Conventions were passed by the International Labour Conference in 1947/1948 in the immediate post World War II period. The UN General Assembly passed the ICESCR in 1966 during the post war economic boom. The standards, therefore, were established during a period of reconstruction and economic promise. Sharard notes that the principle of freedom of association enacted at the time represents the political and theoretical compromises made in the post war period between the liberal political economic model and the perceived need to improve the market position of labour.⁸

Exploring this compromise, Sharard notes that:

[i]n a pragmatic reconciliation, the state and employers recognised trade unions as partners in economic and social processes through various tripartite arrangements and schemes facilitating collective bargaining ... Labourism, combined with [the adoption of] ... Keynesian welfare capitalism – integrated unions into the political economy, with collective objectives and criteria partially displacing individual and utilitarian ones.⁹

Therefore, the model of freedom of association was founded during a period where the integration of labour into the processes of the State and the facilitation of collectivism were acceptable on the basis of this political compromise. In consequence, a significant amount of commentary that interprets the instruments presupposes the continuation of the Western commitment to collective bargaining, the presence of governments that are not inherently hostile to collectivism, and the continued role of trade unions as social partners. Further, Mitchell and Min Aun Wu argue that by the 1960's it was generally assumed that non-Western States undergoing industrialisation would adopt a tripartite collective bargaining model as a demonstration of 'convergence theory'.¹⁰ Convergence theory suggests that ILO and

⁷ R. Ben-Israel, 'Introduction to Strikes and Lock-outs: a Comparative Perspective' in Blanpain and Ben-Israel (eds.), *Strikes and Lock-Outs in Industrialised Market Economies*, (Kluwer Law and Taxation Publishers: Deventer, 1994), 1 at 1.

⁸ T. Sharard, *Competing Models of Worker Representation - The ILO Collective Bargaining Principles and Part VIB of the Industrial Relations Act 1988* (Centre for Employment and Labour Relations Law, University of Melbourne: Parkville, 1996) at 1.

⁹ Ibid.

¹⁰ R. Mitchell and J. Min Aun Wu, 'Introduction: Pressures on the Concept of Labour Law in the Asia-Pacific Region' in R. Mitchell and J. Min Aun Wu, (eds.) *Facing the Challenge in the Asia-Pacific Region: Contemporary Themes and Issues in Labour Law*, (Occasional Monograph No. 5, Centre for Employment and Labour Relations Law, University of Melbourne: Parkville, 1997), x at x.

ICESCR standards were developed from the perspective that “national industrial relations systems would tend to converge upon a particular model in the process of industrialisation”.¹¹ Thus ILO and ICESCR standards reflect a historical perception of universality in the application of the collective bargaining model.¹²

A second consequence of the proposition that ILO and ICESCR standards reflect the era in which they were promulgated is the failure of the ILO to enact an express right to strike. Working from the proposition that freedom of association is collective and functional in nature, it was assumed that the principle of freedom of association encompassed protection of the right to strike.¹³ With hindsight, this presumption is regrettable given that the omission has left room for potential challenges to the functional collective construction of freedom of association. However, the omission has provided interpretative scope for ILO bodies to expand upon the implicit right to strike without the restrictions that an express statement of the right may have produced.¹⁴

A third consequence of the proposition that ILO and ICESCR standards reflect the era in which they were promulgated is the entrenchment of an express right to strike within the ICESCR rather than the ICCPR. This is a reflection of the civil/political – economic/social division of rights. At the time of enactment of the ICESCR economic/social rights were poorer cousins of civil/political rights. In consequence, the ICESCR has historically struggled to attain appropriate recognition.¹⁵ The separation of rights in the ICESCR and ICCPR has facilitated the individualist/collectivist dichotomy in interpretative approaches to the Covenants.

¹¹ Ibid.

¹² Mitchell and Min Aun Wu note a difficulty in the modern application of convergence theory, especially with respect to nations in the Asia – Pacific region: “[w]e must expect divergent approaches to the role and concept of labour law; at least be alive to the possible convergence upon something other than the Western model of collective bargaining”. Mitchell and Min Aun Wu, *supra* note 10 at xv.

¹³ R. Ben-Israel, *International Labour Standards: The Case of Freedom to Strike* (Kluwer Law and Taxation Publishers: Deventer, 1988) at 36 – 37.

¹⁴ Gernigon, Odero and Guido note that the advantage of an implicit right to strike is that the system remains flexible: “without imposing the formal obligations that arise from ratification ... the CFA and CEACR, through their body of principles, [are able] to establish valuable points of references to the international community”. B. Gernigon, A. Odero and H. Guido, *ILO Principles Concerning the Right to Strike* (International Labour Office: Geneva, 2000) at 60.

¹⁵ See P. Alston and G. Quinn, ‘The Nature and Scope of States Parties’ Obligations Under the International Covenant of Economic, Social and Cultural Rights’ (1987) 9 *Human Rights Quarterly* 156.

Further, it has facilitated the perception that the fulfilment of economic/social rights is dependent upon government action and the allocation of significant financial resources.¹⁶ Due in part to the historical distinction between the two types of right; the ICESCR still lacks a complaint mechanism. In consequence, the enactment of the right to strike within the ICESCR suffers from the general difficulties associated with the achievement of economic/social rights. This would not occur if it were recognised as a facet of the principle of freedom of association under the ICCPR.

The wording of the express right to strike in Article 8(1)(d) of the ICESCR has also detracted from the impact that the enactment has had. The limitation “provided that it [the right to strike] is exercised in conformity with the laws of the particular country”, leaves the guarantee of the right open to manipulation by State parties to the Covenant. A broad margin of State appreciation in the domestic application of the right and the lack of a complaint mechanism has meant that State action does not receive the degree of scrutiny required to develop the scope and content of the ICESCR right.

In conclusion, the development of international labour standards on the right to strike has been affected by their promulgation during the post World War II era. This has had three main consequences. First, the standards are based upon the supposition that the governments of States are receptive to the role of trade unions in economic and social policy, and the tripartite management of labour relations. The standards also reflect the convergence theory that all industrial relations systems will eventually converge on a tripartite model of voluntary collective bargaining. Second, the lack of an express right to strike in ILO instruments leaves the implicit right to strike open to challenge, but allows for flexible interpretation. Finally, the enactment of an express right to strike within the ICESCR rather than the ICCPR has adversely limited the development of the right.

¹⁶ See D. Beetham, ‘What Future for Economic and Social Rights?’ in D. Beetham, (ed.) *Politics and Human Rights* (Blackwell Publishers: Oxford, 1995), 41.

Flexible, Non Prescriptive Standards

The right to strike developed through ICESCR and ILO freedom of association standards is facilitative and non-prescriptive. Anderson notes that the model “supports a basic self help process by which workers may seek to improve their own conditions”.¹⁷

The right to strike within the ICESCR is a flexible standard that leaves the margin of State appreciation extremely wide. Within the ILO, the tripartite nature of the organization has led to a particular sensitivity to the difficulties attaching to the development of universal standards applicable across differing levels of industrialisation and industrial relations cultures. Standards developed by the ILO are “predicated on the possibility of very different legal systems adopting fairly standardised norms”.¹⁸ While minimum standards of employment may be liable to expression through prescriptive norms, the principle of freedom of association is not easily adapted and requires flexible, adaptable principles. Kahn-Freund has noted that:

[t]hose who drafted Conventions 87 and 98 must have been well aware of the obstacles to transplantation. In both cases this is shown by the contrast between the principle of freedom of organization expressed in strict legal terms and that chosen to promote collective bargaining, ‘means appropriate to national conditions’.¹⁹

ILO standards have developed to be as flexible and non-prescriptive as possible in order to adapt to pre-existing State institutions and structures. An excellent example of the versatility of ILO standards are the principles developed by the CFA and CEACR relating to the imposition of legitimate prerequisites to undertaking strike action.²⁰ The standards developed accommodate the imposition of negotiation, conciliation, voluntary arbitration, ballots or notice requirements. For each such requirement, the standards require that it not unduly impede the exercise of the right to strike. This flexible approach has allowed for a range of prerequisites to strike

¹⁷ Anderson, *supra* note 6 at 159.

¹⁸ S. Cooney and R. Mitchell, ‘Labour Relations and the Law in Three East Asian NICS: Some Problems and Issues For Comparative Labour Law Inquiry’ (Paper presented at the Global Integration and Challenges for Industrial Relations and Human Resource Management in the Twenty-First Century Conference, Tokyo, 29 May - 2 June 2000) at 12.

¹⁹ O. Kahn Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 *Modern Law Review* 1 at 22.

action to come within the principle of freedom of association, while ensuring that the primary aim of ensuring that the right to strike may be exercised is fulfilled. A specific illustration of this point is the approach of the CFA to the requirement of an absolute majority in a strike ballot. CFA determinations conclude that “particularly where trade unions have large numbers of members or cover a large area”²¹ absolute majorities impede the exercise of the right to strike. This suggests that the right to strike may not be impeded in the case of a requirement for an absolute majority at a single business or workplace or an enterprise based trade union. In this manner, the standards developed by the ILO have been kept flexible and non-prescriptive, allowing for differentiation of Member State practice.

ILO Standards Presuppose the Existence of Voluntary Collective Bargaining Structures

ILO standards with respect to the right to strike presuppose labour relations systems based on voluntary collective bargaining. Labour relations systems based upon different precepts, such as compulsory conciliation and arbitration, will not be able to easily adapt those standards to domestic application.

The ILO Freedom of Association Conventions, while resisting prescriptive standards, are designed to implement the principles of freedom of association through voluntary collective bargaining. The clearest indication of this approach is demonstrated in Article 4 of Convention 98:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for **voluntary** negotiation between employers or employers’ organizations and workers’ organizations, **with a view to the regulation** of terms and conditions of employment by means of **collective agreements** [emphasis added].

The remaining provisions of the freedom of association Conventions reinforce the presupposition of the existence of the model. Articles 2 and 3 of Convention 87 emphasise the voluntary nature of worker and employer organizations, the right to freely participate and the independence of these organizations from State interference.

²⁰ For in-depth discussion of the CFA and CEACR principles relating to the imposition of legitimate prerequisites to undertaking strike action see chapter 3 at 102-107.

²¹ *Complaints presented by the National Labour Front, et al against the Government of Brazil*, Document Vol. LXII, 1979, Series B, No. 3, Report 197, Case 927, para 355.

Articles 1, 2 and 3 of Convention 98 further ensure that individuals who act in association are not subjected to anti-union discrimination. Further, the preamble of Convention 154 *The Collective Bargaining Convention*, 1981 provides that it is desirable to make greater efforts to achieve the general principles set out in Article 4 of Convention 98. Article 5(1) of Convention 154 restates that measures adapted to national conditions shall be taken to promote collective bargaining and Article 5(2) lists the aims of these measures in greater detail than provided in Convention 98.²²

The cumulative effect of these provisions is the presupposition of a model consisting of free private actors (worker associations (trade unions), employers and employer associations), operating voluntarily and free from State interference, negotiating and arranging employment matters on a collective basis. The right to strike flows from this model as an activity exercised by free trade unions, pursuing the interests of trade union members and seeking to compel an employer to enter negotiations or to agree to a set of terms through bargaining.²³ Equally, employers are private actors with market power. This proposition is reinforced by statements of the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) that:

²² Article 5(2) of the Convention provides that the aims of the measures referred to in paragraph 1 of this Article shall be the following:

- (a) collective bargaining should be made possible for all employers and all groups of workers in the branches of activity covered by this Convention;
- (b) collective bargaining should be progressively extended to all matters covered by subparagraphs (a), (b) and (c) of Article 2 of this Convention;
- (c) the establishment of rules of procedure agreed between employers' and workers' organizations should be encouraged;
- (d) collective bargaining should not be hampered by the absence of rules governing the procedure to be used or by the inadequacy or inappropriateness of such rules;
- (e) bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining.

With respect to Article 5(2)(b), subparagraphs (a), (b) and (c) of Article 2 provide:

- (a) determining working conditions and terms of employment; and/or
- (b) regulating relations between employers and workers; and/or
- (c) regulating relations between employers or their organizations and a workers' organization or workers' organizations.

Other instruments that illustrate the model of voluntary collective bargaining include the *Labour Relations (Public Servants) Convention and Recommendation* 1978 (No 151); the *Workers Representatives Convention* 1971 (No 135); the *Collective Agreements Recommendation* 1951 (No 91); the *Voluntary Conciliation and Arbitration Recommendation* 1951 (No 92).

²³ Anderson sums up the equation effectively: "If terms and conditions of employment are fixed through a process of voluntary collective bargaining the ability of workers to negotiate effectively ultimately is dependant on their ability to organise in trade unions and on their ability to strike where necessary to achieve their bargaining goals. In the absence of a legally recognised right to organise and strike, the ability of most workers to negotiate effectively is extremely limited." Anderson, *supra* note 6 at 157.

[t]he Committee considers that the freedom, *de facto* and *de jure*, to establish organizations is the foremost among trade union rights and is the essential prerequisite without which the other guarantees enunciated in Convention Nos 87 and 98 would remain a dead letter. The free exercise of this right ... depends on three things, namely the *absence of any distinction*, in law and practice, among those entitled to the right of association, the *absence of the need for previous authorization* to establish organizations, and *freedom of choice* with regard to membership of such organizations...

The principle of voluntary negotiation of collective agreements, and thus the autonomy of the bargaining partners, is the second essential element of Article 4 of Convention 98. The existing machinery and procedures should be designed to facilitate bargaining between the two sides of industry, leaving them free to reach their own settlement.²⁴

The principles relating to the right to strike, implicit in the freedom of association Conventions, conform to a voluntary collective bargaining model. While the principles are flexible and prone to adaptation, their appropriate application will depend on the extent to which the labour relations system in question applies a voluntary collective bargaining model. A pertinent example of the potential for difficulty is the Australian federal compulsory conciliation and arbitration system that operated from 1904 to 1993.²⁵ The system was regulated through a central tribunal which produced non-consensual binding arbitrated outcomes for the settlement of industrial disputes. The resultant awards formed the basis of the wages and conditions of affected employees. Over-award bargaining occurred, but the majority of employment conditions were settled in a centralised manner.

The compulsory conciliation and arbitration system controlled wage rates and was protective of employee interests. It was considered socially progressive. However, it

²⁴ International Labour Office, *Freedom of Association and Collective Bargaining, General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87) 1948 and the Right to Organize and Collective Bargaining Convention (No. 98) 1949*, Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 81st Session 1994, Report III (Part 4B), Geneva (The 'General Survey, 1994'), 1994, paras 44 and 248.

²⁵ For discussion of the conciliation and arbitration system see B. Creighton, 'One Hundred Years of the Conciliation and Arbitration Power: A Province Lost?' (2000) 24 *Melbourne University Law Review* 839; J. Isaac and S. Macintyre, (eds.) *The New Province for Law and Order: 100 Years of Australian Industrial Conciliation and Arbitration* (Cambridge University Press: Cambridge, 2004); R. C. McCallum, 'The New Millenium and the Higgins Heritage: Industrial Relations in the Twenty First Century' (1996) 38 *Journal of Industrial Relations* 294; M. Pittard, 'The Conciliation and Arbitration Act: The Prevention of Strikes and the Recovery of Wages' (Paper presented at the Australian Conciliation and Arbitration After 75 Years: The Federal Arbitration Process, Present Problems and Future Trends Conference, Monash University, Faculty of Law, 14th of July 1979); J. H. Portus, *Australian Compulsory Arbitration 1900 - 1970* (Hicks Smith and Sons Pty Ltd: Sydney, 1971).

lacked three elements crucial to compliance with international standards. First, the system did not provide a right to strike. Strike action under the common law potentially constituted a breach of contract and trade unions/employees were potentially subject to tortious actions.²⁶ Second, the system did not promote voluntary collective bargaining. While above award collective bargaining was a frequent and tacitly accepted occurrence it was never 'encouraged' or promoted.²⁷ Third, the system was voluntary in appearance only. Trade unions could choose to participate (as they could only access the system if registered) but this choice was illusory as remaining outside the system resulted in isolation and often, redundancy.²⁸ Employers did not even have the illusion of choice. If they were named in a claim, they were bound by the resultant award. Sharard notes that there were "difficulties in reconciling the conciliation and arbitration model and the ILO's scheme based on organisational autonomy."²⁹

These difficulties in establishing compliance with ILO standards were never adequately addressed by the CEACR or the CFA. The CFA was provided with an opportunity to do so in a complaint brought to the CFA in the aftermath of the Australian Pilots' Dispute.³⁰ The complaint made by the complainant criticised the conciliation and arbitration system and the absence of a right to strike, representing "the arbitration system as antithetical to the process of collective bargaining and was

²⁶ See discussion in chapter 6 at 159-165.

²⁷ Sharard argues that above award bargaining under the conciliation and arbitration system was common and suggests that the system may have operated as a "de facto compulsory recognition" system and in reality was a "distinctive collective bargaining system underpinned by minimum standards in awards". See Sharard, *supra* note 8 at 7. It should be noted that there was a formal role for bargaining in the form of pre arbitration conciliation. The conciliation element of the system was mandatory and did provide scope for official bargaining. In addition, unofficial bargaining was also common, before the notification of industrial disputes to the Commission. It also had to occur with respect to matters that were outside the Commissions' jurisdiction. For discussion of the relationship between the compulsory conciliation and arbitration system and collective bargaining see L. Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and the Law* (Law Book Company: Sydney, 1994) at 110 - 112.

²⁸ For discussion of the registration and regulation of federal trade unions under compulsory conciliation and arbitration see B. Creighton, W. Ford and R. Mitchell, *Labour Law: Materials and Commentary* (2nd ed., Law Book Company: Sydney, 1993) chapters 26 and 28. For discussion of the benefits of registration and the role of deregistration of trade unions see *Australian Industrial Relations Law and Systems: Report of the Committee of Review*, Volume Two: Report (Australian Government Publishing Service: Canberra, 1985) at 639 - 642.

²⁹ See Sharard, *supra* note 8 at 7.

³⁰ For discussion of the dispute see K. McEvoy and R. Owens, 'The Flight of Icarus: Legal Aspects of the Pilots Dispute' (1990) 3 *Australian Journal of Labour Law* 87; B. Norington, *Sky Pirates: The Pilots' Strike that Grounded Australia* (ABC Enterprises: Crows Nest, 1990).

tantamount to impugning the compatibility of the legislatively established arbitration system with Australia's international legal obligations".³¹ However despite this challenge to the Australian model, the CFA sidestepped the opportunity to assess the compatibility of the system with international labour standards. Faced with a system that was protective of workers' interests and provided trade unions with power and influence in the industrial relations process, the CFA failed to engage with the more difficult questions relating to compulsion and freedom of association. Instead, the CFA stated that as trade union registration within the conciliation and arbitration system was voluntary and conferred benefits on trade unions, the State could impose reciprocal obligations.³² The CFA argued that the initial voluntary entry of trade unions into the conciliation and arbitration system justified any subsequent compulsion. This determination remains problematic. The voluntariness of trade union participation in the system is questionable. Employers did not have a choice concerning their participation. This demonstrates the difficulties of applying ILO principles relating to strikes and collective bargaining to a labour relations system not founded upon the principles of voluntary collective bargaining.

Despite this illustration of the difficulties, the CEACR considers that the principle of freedom of association developed by the ILO does not require a particular model of labour relations for implementation:

far from trying to impose a uniform model of labour relations legislation, it endeavours, in cooperation with the other supervisory bodies, to open up a dialogue with member States with the aim of bringing national legislation into conformity with the Conventions.³³

This confident assertion does not adequately address the difficulties involved. It is true that the CEACR and CFA are not attempting to dictate the imposition of a uniform model of labour relations. However, the standards developed do conform to a certain model and difficulties are faced when those standards are 'transplanted' onto a model with substantially different precepts. ILO standards allow for a considerable degree of flexibility when applied to a model that is essentially one of voluntary

³¹ K. McEvoy and R. Owens, 'On a Wing and a Prayer: The Pilots Dispute in the International Context' (1993) 6 *Australian Journal of Labour Law* 1 at 8; *Complaint Against the Government of Australia presented by the International Federation of Air Line Pilots Associations (IFALPA)*, CFA, Report 277, Case 1511.

³² *CFA Determination in the Pilots Dispute*, supra note 31 at para 229.

³³ General Survey, 1994, supra note 24 at para 283.

collective bargaining, but are less adaptable when applied outside of that normative model.

Accordingly, the right to strike within the ICESCR and the ILO is a functional right operating as a facet of the principle of freedom of association that supports a labour relations system of voluntary collective bargaining. ILO principles of freedom of association, while flexible and non-prescriptive, are not easily adapted to labour relations systems other than voluntary collective bargaining.

The ILO Model is Consistent with Contractualist Private Ordering

The ILO model of voluntary collective bargaining, supported by the right to strike, is consistent with the principles of the free market, encouraging the private ordering of employment related matters. Sharard notes that while ILO standards are not based on a private contractualist model, they are consistent with contractualist private ordering.³⁴

The essence of the ILO bargaining regime is voluntariness and collectivity. Employers and workers organizations are treated as voluntary actors, neither of which can be compelled to bargain or reach agreement. Strike action operates within this model to provide a mechanism for the exercise of private power supporting bargaining. State intervention to compel bargaining would be inconsistent with ILO standards and would deprive the process of its voluntary character. In the absence of Government intervention, the weapon of the strike is needed to operate as a tool of bargaining.

The concept of voluntariness goes beyond the precept that both parties to the bargaining process should be volunteers, only coerced by industrial pressure. It extends to the principle that the State should allow the bargaining parties to resolve their own disputes. The legal regulation of strikes should be minimal in order to ensure that regulation “does not smother the very system of free collective bargaining which the law is designed to protect”.³⁵ This link between voluntariness and the

³⁴ Sharard, *supra* note 8 at 4.

³⁵ P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (The Carswell Company Ltd: Toronto, 1980) at 289.

regulation of strike behaviour was explored by Cassim in a discussion of the right to strike in South Africa.³⁶ Cassim argues that the regulation of strike action in South Africa threatens to smother the right to strike because the “legally regulated system is in conflict with the basic principle of the voluntarist philosophy of allowing industry to make its own bargains and disagreements”.³⁷ Weiler has also noted this problem with respect to Canada in 1980: “[w]e have gone about as far as we can go in legally regulating strike action in Canada. All that remains of the right to strike is the irreducible minimum.”³⁸ There is a tension between the impulse of States to regulate strikes due to their potential for economic damage and the need to ensure voluntariness in the private ordering of employment affairs.

The second element in the ILO bargaining regime is collectivity. The freedom of association Conventions are couched in the language of collective rights.³⁹ Article 4 of Convention 98 requires ratifying States to take action to promote **collective** bargaining. Therefore, the principles relating to strike action implicit in the Freedom of Association Conventions support the right of the collective to strike in pursuit of collective objectives.⁴⁰

The essential point is that ILO collective bargaining standards are not inconsistent with modern deregulationist (or ‘reregulationist’) free market policies. The standards are not contractualist due to their emphasis on collective **agreements** rather than individual **contracts**, but they do support the private ordering of labour relations by employers and employee organizations operating largely free from State regulation. The operation of this model requires recognition and protection of the right to strike in order to empower workers for the bargaining process. The ILO collective bargaining model dictates that labour market conditions should be set by private actors in a free market context, utilising the tools of strike action and labour market monopoly, in

³⁶ M. Y. Cassim, ‘Freedom to Strike: The Myth of Voluntarism’ (1989) 11 *Loyola of Los Angeles: International and Comparative Law Journal* 281.

³⁷ *Ibid* at 281.

³⁸ Weiler, *supra* note 35 at 69.

³⁹ Convention 87, Article 2, sets out the only individually expressed right within the Conventions, the right of the individual to form and join a collective worker or employer organization. See Sharard, *supra* note 8 at 3.

⁴⁰ Lord Wedderburn, *Employment Rights in Britain and Europe: Selected Papers in Labour Law* (Lawrence and Wishart: London, 1991) at 138.

order to engage in meaningful bargaining.⁴¹ Strike action is a necessary element of this model. Employers are free, within the limits of the law, to use the tools of incorporation, hiring, firing and managerial prerogative to control their side of the bargaining equation, so workers equally must be free to utilise the tools of unionisation and collective withdrawal of labour to achieve their employment objectives.

The ILO Principle of Freedom of Association Accommodates Elements of Liberal Individualist Ideology

The final proposition with respect to the right to strike relates more generally to the principle of freedom of association. The principle of freedom of association from which voluntary collective bargaining and the right to strike are developed is capable of accommodating elements of the liberal individualist approach to freedom of association. Primarily, it can support the inclusion, in national labour law systems, of a right not to associate. However, it will not support the individualisation of labour relations or the exclusion of trade unions from the bargaining process.

The recognition of collective bargaining and the right to strike does not necessitate the holding of a view either way on the issue of disassociation. The matter is left to States to make their own (ideological) choices concerning whether or not to permit closed shops, compulsory membership or protection of the negative right to associate.⁴²

⁴¹ The issue of trade union monopoly is discussed within the CEACR General Survey, 1994 at paragraphs 91 – 96. The discussion suggests that trade union monopoly is in accordance with the principle of freedom of association as expressed within the Freedom of Association Conventions provided that such monopoly is not imposed by law, “[t]here is a fundamental difference between, on the one hand, a trade union monopoly established or maintained by law and, on the other hand *voluntary* groupings of workers or unions which occur (without pressure from the public authorities, or due to the law) because they wish, for instance, to strengthen their bargaining position, coordinate their efforts to tackle ad hoc difficulties which affect all their organizations”. Monopoly in this sense refers to the plurality of trade unions or otherwise. The other form of monopoly that may occur is where a trade union has a monopoly over labour in a particular area. This may be a natural result of collectivisation in an industry or business area. While this may be portrayed as a labour ‘cartel’ impeding the natural flow of the labour market, monopoly is a potential result of the operation of the free market and a potential result of collectivisation of labour. As employers are free to monopolise the sources of employment within a particular area, so too must employees be free to form trade unions that monopolise labour in a particular area in order to provide an appropriate balancing mechanism.

⁴² The CEACR has stated that “systems which prohibit union security practices in order to guarantee the right not to join an organization, as well as systems which authorize such practices, are compatible with the Convention [No. 87]”. General Survey, *supra* note 24 at para 100. With respect to the right not to belong to a trade union, the CEACR has confirmed that such laws are compatible with the Freedom of Association Conventions, noting that “[i]n several countries, the law guarantees directly or indirectly the right not to join an organization, as well as systems which authorize such practices ... [and that

However, ILO principles do not encompass individual bargaining. The ILO expression of the principle of freedom of association encompasses collective activity; Convention 98 requires the promotion of collective bargaining, and strike action is collective in nature. Both Australia and New Zealand have been criticised by the CFA for their emphasis on individual bargaining.⁴³ However this criticism has not been confined to the Antipodes. In the CEACR's 1994 General Survey the Committee expressed a concern that, "in several countries there has been a recent tendency for the legislature to give precedence to individual rights over collective rights in employment matters".⁴⁴

The commentary of the CEACR reflects a growing conflict between the emphasis on collectivity in international labour standards and the rise of individualism in the legal structures of Western nations. This issue presents a challenge to Australian compliance with international labour standards on the principle of freedom of association as will be examined in the following chapters.

Conclusion

This chapter has explored the nature of the right to strike in international law and more specifically within ILO standards and the ICESCR. The principal expression of the right to strike is contained within the ICESCR, however the most comprehensive and developed source of the obligation to respect the right to strike is contained within the commentary of ILO bodies, specifically the CFA and CEACR.

The nature of the right to strike expressed within the ICESCR and implicit within the principle of freedom of association enshrined in the ILO is flexible, adaptable and accommodating. The standards developed are non-prescriptive and designed to apply across differing levels of industrialisation and industrial relations cultures. Further, the

these] are compatible with the Convention [No. 87]". General Survey, *supra* note 24 at para 101. For historical discussion of the practice of closed shop in Australian law see P. Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (Federation Press: Annandale, 1995).

⁴³ See *Complaint against the Government of New Zealand presented by the New Zealand Council of Trade Unions (NZCTU)*, Report 292, Case 1698; *Complaint against the Government of Australia presented by the International Confederation of Free Trade Union (ICFTU), the International Transport Workers' Federation (ITF), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia*, Report 320, Case 1963.

⁴⁴ General Survey, *supra* note 24 at para 236.

standards are consistent with the contractualist private ordering of employment terms and conditions and are capable of accommodating an express right of disassociation where a Member State chooses to implement one. However, despite this flexibility, the standards tend to be most suitable for labour relations systems modelled upon voluntary collective bargaining, and ongoing trade union participation. This aspect of the standards reflects the era in which they were promulgated, the tripartite nature of the ILO and the functional interpretative approach taken to the principle of freedom of association.

Ultimately the right to strike in international law is capable of accommodating a variety of different approaches provided they occur within the framework of voluntary collective bargaining. The design is minimalist in approach, providing State actors with a freedom of design within set limitations, given that the ability to strike in support of free and voluntary bargaining is not impeded.

Chapter Five

An Entrenched Right to Strike in Australia?

Introduction

The preceding chapters have explored the content of the right to strike expressed within the international instruments that Australia has voluntarily ratified. The discussion examined the extent of the obligation to implement the right to strike and the model of bargaining framing the right to strike within international standards. The thesis will now examine Australian law and practice in order to ascertain the extent to which the Australian bargaining model accommodates strike action and complies with the international law framework outlined above.

The role of this chapter is to consider whether, apart from any international law obligations there is a right to strike in domestic Australian law and to consider the jurisdictional issues that arise through the implementation of a right to strike. This will serve to provide the legal and conceptual basis for the following chapter that explores the substantive Australian law relating to strikes. Further, the chapter will consider the current legal status of international labour law in Australia.

Federal Regulation and the Application of International Instruments

Jurisdictional Issues: Constitutional Heads of Power

The Australian labour relations system is shaped by the federal/state division of powers contained in the Australian Constitution, providing the Commonwealth Parliament with a limited range of legislative powers, set out largely in s 51. The industrial relations power is contained in s 51(xxxv) granting the Commonwealth Parliament the power to make laws with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State”.

A detailed discussion of the conciliation and arbitration power and the difficulty that it has presented to the federal regulation of labour relations is beyond the scope of this thesis.¹ However, discussion is warranted with respect to the extent to which this restricted legislative competence has affected the ability of the Commonwealth Parliament to implement a right to strike. The narrow scope of s 51(xxxv) means that the Commonwealth Parliament does not have the power to pass prescriptive legislation regulating terms and conditions of employment or enabling collective bargaining.² The section only provides for the establishment of mechanisms to facilitate the conciliation and arbitration of industrial disputes³ that extend beyond the limits of any one State.⁴ While in practice the power has been used in an expansive manner, recent federal governments have sought to bypass its limitations by using alternate Constitutional heads of power.⁵ In addition, there have been numerous attempts via referenda to pass amendments to the Constitution to enhance the scope of the power, none of which has met with success.⁶ The chapter will now consider the enactment of a right to strike in Australian law through the *Industrial Relations Reform Act 1993* (Cth) and the subsequent *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (WROLAA), addressing constitutional issues as they arise.

The Right to Strike and the Industrial Relations Reform Act 1993 (Cth)

The *Industrial Relations Reform Act 1993* (Cth) ('The Reform Act') represented a significant shift in the jurisdictional basis of the federal labour law system. Rather

¹ For detailed discussion of the conciliation and arbitration power in the Australian Constitution see G. Williams, *Labour Law and the Constitution* (Federation Press: Annandale, 1998).

² *Jumbunna Coal Mine (NL) v The Victorian Coal Miners Association* (1908) 6 CLR 309 per Griffiths CJ at 332, "[t]he power, so far as regards the prevention of disputes, is limited to conciliation for that purpose. It does not extend to making laws for what is called 'collective bargaining', except so far as collective bargaining may be incidental to such conciliation or to arbitration for the settlement of existing disputes."

³ For discussion of the meaning of *industrial disputes* in the context of the Australian Constitution, s 51(xxxv) see Williams, *supra* note 1 at 48 – 56; 61 – 68.

⁴ For discussion of the meaning of "beyond the limits of any one State" in the context of the Australian Constitution, s 51 (xxxv) see Williams, *supra* note 1 at 56 – 61.

⁵ See W. J. Ford, 'The Constitution and the Reform of Australasian Industrial Relations' (1994) 7 *Australian Journal of Labour Law* 105.

⁶ There have been at least six failed attempts to alter the conciliation and arbitration power of the Australian Constitution to give prescriptive labour relations powers to the Commonwealth Parliament. See E. Campbell, 'Southey Memorial Lecture 1988: Changing the Constitution - Past and Future' (1989) 17 *Melbourne University Law Review* 1; M. McKenna, A. Simpson and G. Williams, 'With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (2001) 24 *University of New South Wales Law Journal* 401.

than near exclusive reliance upon the conciliation and arbitration power, the Act sought to achieve extensive coverage through reliance upon a range of other Constitutional heads of power.

The introduction of a right to strike in the Reform Act was facilitated through the external affairs power (s 51(xxxv)), by way of reliance upon ratified international instruments.⁷ The Act provided immunity from civil liability for strike action and protection against termination of employment for engaging in strike action.⁸

Division 4 of the *Industrial Relations Act* 1988 (Cth) as amended by the Reform Act (hereafter 'IR Act (as amended)')⁹ was headed "Immunity from Civil Liability" and s 170PA set out the object of the Division:

s.170PA(1) The object of this Division is to give effect, in particular situations, to Australia's international obligation to provide for a right to strike. This obligation arises under:

- (a) Article 8 of the International Covenant on Economic, Social and Cultural Rights; and
- (b) the Freedom of Association and Protection of the Right to Organise Convention 1948; and
- (c) the Right to Organise and Collective Bargaining Convention, 1949; and
- (d) the Constitution of the International Labour Organization; and
- (e) customary international law relating to freedom of association and the right to strike.

The Act further provided in s 170PA(2) that

The Parliament considers that it is necessary to provide specific legislative protection for the right to strike, subject to limitations compatible with the existence of the right, in situations where:

- (a) there exists an industrial dispute involving an employer and one or more organizations members of which:

⁷ Relevant ILO Conventions were introduced by the *Industrial Relations Reform Act* 1993 (Cth) (Reform Act) to form Schedules to the *Industrial Relations Act* 1988 (Cth): Schedule 15 - *Preamble and Parts I and II of the Convention concerning Freedom of Association and Protection of the Right to Organise*, ILO, No. 87 and Schedule 16 - *Preamble and Articles 1-6 of the Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*, ILO, No. 98.

⁸ For discussion of the introduction of a right to strike in the Reform Act see G. McCarry, 'Sanctions and Industrial Action: The Impact of the Industrial Relations Reform Act' (1994) 7 *Australian Journal of Labour Law* 198.

⁹ The *Industrial Relations Reform Act* 1993 (Cth) (the Reform Act) amended the terms of the *Industrial Relations Act* 1988 (Cth) 1988. Therefore the changes of the Reform Act were enacted in the *Industrial Relations Act* 1988 (Cth). In order to distinguish between the Industrial Relations Act prior to 1993 and after 1993, the IR Act as affected by the Reform Act will be referred to as 'the IR Act (as amended)'.

- (i) are employed by the employer to perform work in a single business, part of a single business or a single place of work; and
- (ii) are covered by an award; and
- (b) the employer and one or more of those organizations are negotiating an agreement under Division 2.

The IR Act (as amended) set out a protected action regime that provided immunity from liability under civil law for industrial action undertaken during a bargaining period for the negotiation of a certified agreement between an employer and employees employed at a single business or place of work.¹⁰ The Act also set out notice requirements,¹¹ negotiation and ballot requirements,¹² and provided the AIRC with the ability to suspend the bargaining period for a range of reasons including those related to strike action.¹³

In addition, the Act sought to provide protection for employees against termination of employment for engaging in strike action:

334A(1) The object of this section is to give effect, in certain respects, to Australia's international obligation to provide for a right to strike. This obligation arises as mentioned in s 170PA.

334A(2) An employer must not dismiss an employee, injure an employee in his or her employment, or alter the position of an employee to the employee's prejudice, merely because the employee has engaged or is proposing to engage, in industrial action in relation to an industrial dispute that has been notified to the Commission or that the Commission has found to exist.

¹⁰ IR Act (as amended) s 170PM.

¹¹ IR Act (as amended) s 170PH.

¹² IR Act (as amended) ss 170PI and 170PK.

¹³ IR Act (as amended) s 170PO. Subsection 1(a) provided that the AIRC can suspend or terminate a bargaining period if the Commission is satisfied that:

- (a) a negotiating party that has organised or is organising, or has taken, industrial action to support or advance claims that are the subject of the industrial dispute:

- (i) is not genuinely trying to reach an agreement with the other negotiating parties in settlement of the industrial dispute; or
- (ii) has failed to comply with any directions by the Commission relating to negotiating in good faith; or

industrial action that is being taken to support or advance claims that are the subject of the industrial dispute is threatening:

- (iii) to endanger the life, the personal safety or health, or the welfare, of the population or the part of it; or
- (iv) to cause significant damage to the Australian economy or an important part of it; ...

The use of the external affairs power in the Reform Act to implement legislation otherwise outside the ambit of federal powers was not novel in a Constitutional sense, but it did represent a new approach to the regulation of labour relations in Australia.¹⁴ The provisions of the IR Act (as amended) were challenged by the States of Victoria, South Australia and Western Australia in *Victoria v Commonwealth*.¹⁵ These States challenged the provisions of the IR Act (as amended) that relied upon the external affairs power, arguing that the power of the Commonwealth to legislate with respect to external affairs did not extend to treaty obligations unless the subject matter of the treaty was one of "international concern".¹⁶ It was argued that this would render the provisions invalid as the relevant ILO Conventions covered topics that were more appropriately the internal concern of States. This challenge to the legislation provided the High Court with an opportunity to clarify the scope of the external affairs power in the Constitution and comment specifically with respect to the provisions guaranteeing a right to strike.¹⁷

The majority judgment of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ examined the scope of legislative power that the external affairs power extended to the Commonwealth Parliament. The judgment restated the established principle that the power to legislate for external affairs includes the power to implement treaties, but

¹⁴ A majority of the High Court recognised, in obiter, the use of the external affairs power for federal legislative competence in areas outside those expressly enacted in the Constitution as valid in *R v Burgess; Ex Parte Henry* (1936) 55 CLR 608. See M. Castan and S. Joseph, *Federal Constitutional Law: A Contemporary View* (Law Book Company: Sydney, 2001) at 86. This was subsequently confirmed in *Commonwealth v Tasmania* (1983) 158 CLR 1. See M. Coper, 'The High Court and the World of Policy' (1984) 14 *Federal Law Review* 294; C. Saunders, 'The National Implied Power and Implied Restrictions on Commonwealth Power' (1984) 14 *Federal Law Review* 267; G. Sawyer, 'The External Affairs Power' (1984) 14 *Federal Law Review* 199; J. A. Thomson, 'A Torrent of Words: A Bibliography and Chronology on the Franklin Dam Case' (1985 - 1986) 15 *Federal Law Review* 145. Prior to the use of the external affairs power in the Reform Act, discrimination in employment had been prohibited in legislation including the *Racial Discrimination Act* 1975 (Cth), *Sex Discrimination Act* 1984 (Cth), *Human Rights and Equal Opportunity Commission Act* (Cth) and the *Disability Discrimination Act* 1992 (Cth) that was based upon international Treaties and Conventions of the ILO. For discussion of anti-discrimination legislation in the employment context and the use of the external affairs power as a basis for legislative competence see J. Macken, P. O'Grady, C. Sappideen, and G. Warburton, *The Law of Employment* (5th ed., Lawbook Co.: Sydney, 2002) at chapter 15.

¹⁵ (1996) 187 CLR 416.

¹⁶ *Ibid* at 427.

¹⁷ For discussion of the case generally see K. Eastman, 'The Relationship between International Law and Australian law' [1997] *Australian International Law Journal* 86; G. Williams and A. Simpson, 'The Expanding Frontiers of Commonwealth Intervention in Industrial Relations' (1997) 10 *Australian Journal of Labour Law* 222. For discussion of the case as it relates to the right to strike see R. Dalton and R. Groom, 'The Right to Strike in Australia: International Treaty Obligations and the External Affairs Power' (2000) 1 *Melbourne Journal of International Law* 162.

it is not confined to this power and is to be construed with all the generality that the words 'external affairs' admit.¹⁸ The court further stated that to be a law with respect to 'external affairs', the law "must be reasonably capable of being considered appropriate and adapted to implementing the treaty".¹⁹ Further, legislation which implements a treaty need not comply with all of the obligations assumed under the treaty, although substantial deficiency in this area may deny the legislation the character of a measure that implements the treaty.²⁰

The majority then considered the specific provisions enacting a right to strike. The objects of Part VIB, Division 4 as set out in s 170PA(1) purported to set out the international obligations upon which the provisions regulating strike action were based. The majority noted that Article 8 of the ICESCR is the only international instrument that was relied upon by s 170PA(1) that employs the term 'right to strike'.²¹ Further, the court noted that Convention No. 87 provides generally for the right of workers and employers to freely establish or join representative organizations and that Convention No. 98, Article 4 provides that measures appropriate to national conditions shall be taken to encourage and promote the development of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations.²² In addition the court stated that the Constitution of the ILO makes no reference to a right to strike, and without making any concessions, the court noted that if there is any right to strike within the Constitution of the ILO, it operates as an implied right.²³

¹⁸ *Victoria v Commonwealth*, supra note 15 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 485. A further submission considered by the majority argued that the extent of reliance on ILO Conventions within the Act was beyond the contemplation of the authors of the Constitution at the time of its adoption and was not encompassed by the grant of power. In response, the majority stated that treaties in existence in 1900 embraced a range of topics and that the content of the legislative power of the Commonwealth is to be understood accordingly. In support of this argument the majority referred to the decision of Evatt and McTiernan JJ in *R v Burgess; Ex Parte Henry* (1936) 55 CLR 608 at 687: "[b]ut it is not to be assumed that the legislative power over 'external affairs' is limited to the execution of treaties or conventions; and ... the Parliament may well be deemed competent to legislate for the carrying out of 'recommendations' as well as the 'draft international conventions' resolved upon by the International Labour Organization or of other international recommendations or requests upon other subject matters of concern to Australia as a member of the family of nations" at 483.

¹⁹ *Victoria v Commonwealth*, supra note 15 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 487.

²⁰ *Ibid* at 489.

²¹ *Ibid* at 544.

²² *Ibid* at 544-545.

The final obligation relied upon within s 170PA(1) was customary international law relating to freedom of association and the right to strike.²⁴ The majority did not accept that customary international law provided a basis for domestic legislation implementing a right to strike. Customary international law requires consistency of State practice and acceptance by those same States that they are bound to so act.²⁵ Upon consideration of the material presented to the court, the majority could find no basis for the existence of a right to strike in customary international law.²⁶

The majority then determined whether or not there was a relevant instrument on which legislation providing a right to strike could be constitutionally based. The majority found that the provisions providing a right to strike was validly enacted on the basis of Article 8 of the ICESCR, which contained the only direct expression of the right to strike within the instruments enumerated.²⁷ It was considered unnecessary to discuss whether the provisions of the ILO Conventions gave rise to an obligation to provide a right to strike or whether the activities of agencies of the ILO (such as the CFA) give rise to the ability to legislate under s 51(xxxv) of the Constitution.²⁸

The holding of the court was that as an implementation of Article 8 of the ICESCR, it was open to Parliament to conclude that the existence of common law remedies against strikes and strike organisers are inconsistent with the right to strike. The qualification of common law rights of action by the protected action provisions fulfilled, at least in part, Australia's obligations under Article 8 of the ICESCR and were not open to challenge on this ground.²⁹ In addition, s 334A was considered to be appropriate to give effect to Article 8.³⁰

The final aspect of the majority judgment to note is the discussion of lockouts. Part VIB, Division 4 provided protection for employers who, in breach of their contracts

²³ Ibid at 545.

²⁴ IR Act (as amended), s 170PA(1)(e).

²⁵ *Victoria v Commonwealth*, per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 545.

²⁶ Ibid.

²⁷ Ibid at 546.

²⁸ Ibid at 545 – 546.

²⁹ Ibid at 546 – 547.

³⁰ Ibid at 547.

with their employees, locked out employees from their place of employment.³¹ The majority held that this provision did not protect the right to strike, and was not a qualification on the right to strike as it could be exercised by the employer in the absence of an intention on the part of employees to undertake strike action.³² The majority held that the lockout provisions were not appropriate or adapted to implementing Article 8 of the ICESCR (that does not encompass employer industrial action).³³

One question remaining unresolved by the decision in *Victoria v Commonwealth* is whether or not the Commonwealth Parliament has the power to implement legislation providing a right to strike based upon the instruments or activities of the agencies of the ILO. The question is important, given the limited scope of the development of Article 8(1)(d) of the ICESCR, the continued absence of an ICESCR complaints mechanism and the possibility of future restrictive interpretations of the ICESCR. The issue was side stepped by the High Court when it noted that it was “unnecessary” to determine whether the ILO Conventions give rise to a right to strike.³⁴ In doing this, the High Court deferred consideration of the matter. Dalton and Groom state that,

[T]he High Court was unwilling to find that the *ILO Conventions* contain an obligation to protect the right to strike; therefore the government could not pass legislation pursuant to the external affairs power protecting the right to strike, at least in so far as the legislation was based on the implementation of ILO convention obligations.³⁵

However, the implications of the decision in *Victoria v Commonwealth* are not as drastic as Dalton and Groom suggest. The majority deemed it unnecessary to consider whether ILO Conventions would support legislation implementing a right to strike; and they did not rule out the possibility. Were the issue to be considered by the court in the future, it may be forced to grapple with the question of whether the ILO instruments and activities of ILO agencies support the obligation to provide a right to strike. This could occur if the legislation was not supported by the ICESCR or if it

³¹ IR Act (as amended), s 170PG(3).

³² *Victoria v Commonwealth*, supra note 15 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 546.

³³ Ibid at 546 – 547. However, the majority judgment found that the lockout provisions were validly enacted under the conciliation and arbitration power, at 547-550.

³⁴ Ibid, at 545.

³⁵ Dalton and Groom, supra note 17 at 165, italics in original.

was unclear whether or not the ICESCR enactment of the right to strike extended to the scope of any right to strike implemented under the external affairs power. The limited terms of the ICESCR and absence of jurisprudential development of the content of the obligation could create uncertainty over the scope of a right to strike enacted as an expression of the Covenant in domestic law. The decision in *Victoria v Commonwealth* only indicates, at this point, that the ILO Conventions and the Constitution make no express statement of the right to strike. It does not indicate whether the Court would be prepared to accept the ILO interpretation of the principle of freedom of association as a sufficient basis for legislation guaranteeing a right to strike under the external affairs power. This may, in future, be a necessary question to answer.

The Right to Strike and the Workplace Relations Act 1996 (Cth)

The passage of the *Workplace Relations and Other Legislation Amendment Act 1996 (Cth)* (WROLAA), was a retreat from the use of international obligations to provide a jurisdictional basis and legal imperative for the recognition of the right to strike, but not from enactment of the right itself. The *Workplace Relations Act 1996 (Cth)* (WRA) enshrines the right to strike through the protected action provisions, but the jurisdictional basis for the legislation is a range of powers including the conciliation and arbitration power, the corporations power,³⁶ and the trade and commerce power³⁷ instead of the external affairs power. Ford has noted that:

[t]he most striking difference from a constitutional point of view, between the WR Act and its predecessor, the *Industrial Relations Act 1988 (Cth)* is ..., the greatly reduced significance the statute accords the external affairs power.³⁸

The main Constitutional head of power relied upon by the WRA is the Corporations power. However, evidence of a residual commitment to international labour standards remains, and Creighton notes that some provisions of the Act continue to derive their constitutionality from the external affairs power, particularly those provisions relating

³⁶ The Corporations Power - Section 51(xx) grants to the Commonwealth the power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth".

³⁷ The Trade and Commerce Power - Section 51(i) grants to the Commonwealth the power to make laws with respect to "trade and commerce with other countries, and among the States".

³⁸ W. J. Ford, 'Reconstructing Australian Labour Law: A Constitutional Perspective' (1997) 10 (1) *Australian Journal of Labour Law* 1 at 2.

to unlawful termination of employment.³⁹ One of the principal objects of the WRA is to “assist in giving effect to Australia’s international obligations in relation to labour standards”.⁴⁰ With respect to the right to strike, jurisdictional reliance has been completely shifted to the Corporations power, the conciliation and arbitration power and the trade and commerce power. The only reference remaining to international labour standards that could apply to the right to strike is the general object expressed in s 3(k). The WRA retains a modified protected action regime but s 334A was repealed.

The importance of the change in jurisdictional reliance is not legal, as the right remains enacted and valid. Instead it is political and ideological. Under the Reform Act, recognition of the right to strike was explicitly and clearly linked to Australia’s international obligations. The WROLAA retreated from this position, in line with the reluctance on the part of the Howard Coalition Government to look internationally for sources of legal norms. The WRA is inward focused, rejecting international instruments as a source of inspiration or obligation, and embracing a labour relations agenda unencumbered by legislative reliance upon international norms. The change may have significance for Australian compliance with international obligations. It may also be indicative of the attitude of the Australian Government to the importance of compliance as a goal for Australian labour law.

The enactment of the right to strike within the WRA was considered by the Victorian Court of Appeal in *National Workforce Pty Ltd v Australian Manufacturing Workers Union*.⁴¹ The case involved a dispute between a group of labour hire companies and three unions engaged in collective bargaining under the terms of the WRA. The Australian Manufacturing Workers Union (AMWU) undertook strike action in

³⁹ B. Creighton, ‘The Workplace Relations Act in International Perspective’ (1997) 10 *Australian Journal of Labour Law* 31 at 33. See Schedule 10 - *Convention Concerning Termination of Employment at the Initiative of the Employer*, ILO, No. 158; and Schedule 12 - *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities*, ILO, No. 156.

⁴⁰ WRA s 3 provides that “the principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by: (k) assisting in giving effect to Australia’s international obligations in relation to labour standards”.

⁴¹ [1998] 3 V.R. 265. See V. Di Felice, ‘Stopping or Preventing Industrial Action In Australia’ (2000) 12 *Melbourne University Law Review* 310; W. Friend, ‘The Right to Strike’ (1998) 23 *Alternative Law Journal* 95.

accordance with the protected industrial action provisions of the WRA. The other two unions attempted to engage in protected industrial action but failed to give the requisite statutory notice under s 170MI.⁴² The labour hire companies applied to the Supreme Court of Victoria seeking injunctions against the three unions on the grounds that the unions were committing the tort of inducing breach of contract and argued that such injunctions were available as the unions were not engaging in protected strike action. With respect to the AMWU, the employers alleged that the statutory protection from liability had been removed by s 170MM because the AMWU had engaged in industrial action in concert with one or more persons or organizations that were not 'protected persons'.⁴³

At first instance the case was heard by Harper J.⁴⁴ Harper J granted interlocutory injunctions against the two unions who had failed to give notice under s 170MI, holding that the failure meant that their strike action did not have protected status under the WRA. In considering whether or not to exercise his discretion to grant an injunction with respect to the AMWU, Harper J found that the only deviation the union had made from the protected action provisions was to call the strike in concert with two unions who had not given the requisite notice, and there was no evidence that the AMWU knew of this failure.⁴⁵ Harper J also considered the existence of a 'right to strike' in Australian law. His honour noted that the right continues to have meaning in the context of the WRA, although "hedged about with qualifications", and that the right is recognised in international law.⁴⁶ His honour concluded,

It [the right to strike] is also, I think, recognised as a fundamental element of industrial relations in Australia. In my opinion, I should not interfere with the right to strike in this case merely because the first defendant has acted in concert with other unions which did not give the notices which were required by the Act.⁴⁷

⁴² WRA s 170MI(2) requires parties who wish to negotiate a relevant agreement to initiate a bargaining period by giving written notice to the other party that begins 7 days after the day on which the notice was given (s 170MK).

⁴³ WRA s 170MM(1) - industrial action will not be protected action if it is engaged in in concert with one or more persons or organizations that are not protected persons.

⁴⁴ *National Workforce Pty Ltd and Others v Australian Manufacturing Workers' Union and Others* (1997) 75 IR 200.

⁴⁵ *Ibid* per Harper J at 202.

⁴⁶ *Ibid*.

⁴⁷ *Ibid*.

Harper J relied upon recognition of the right to strike in international law, in the WRA and as a fundamental element of industrial relations in Australia as a ground for influencing the exercise of his discretion to grant an interlocutory injunction, and refused to grant the requested injunction against the AMWU.

The labour hire companies appealed to the Victorian Court of Appeal.⁴⁸ The court held that Harper J's exercise of discretion in refusing to grant an injunction had miscarried through the inclusion of a general right to strike as an influential factor. The majority stated that, "a right to strike is now generally recognised in the civilised world". However, the existence of "some generally recognised right to strike" apart from the WRA was irrelevant to the exercise of judicial discretion when the main precondition to the plaintiff's claim for an injunction was the failure of the AMWU to comply with the protected action provisions.⁴⁹ The court concluded that "[c]omplaint about non-compliance with the statutory provisions is not well answered by considering what might have been, had the Act not intervened".⁵⁰

The decision of the Victorian Court of Appeal, while not denying the existence of 'some generally recognised right to strike', held that such a right is irrelevant because the WRA prescribes the preconditions for the exercise of the right to strike for parties bargaining under the federal system. The boundaries of the right to strike are entirely defined by the WRA and not by any residual general law right or international law.

A Right to Strike in the Australian Constitution?

The next question to consider is whether there is, or is the potential for, an entrenched right to strike in the Australian Constitution.

The Constitution of Australia is not a rights based document. Rather it establishes the delineation of power within the Australian Federation and the system of government

⁴⁸ *National Workforce Pty Ltd v Australian Manufacturing Workers Union* [1998] 3 V.R. 265 per Phillips, Charles and Batt JJ.A.

⁴⁹ *Ibid* at 275 – 276.

⁵⁰ *Ibid*.

applying at the federal level.⁵¹ The positive rights that are enacted are few and far between, and relate more to the federal nature of the Australian nation rather than to the enshrining of positive rights for citizens.⁵² This, and the difficulties associated with amending the Constitution, have led to the express terms of the Constitution remaining a static blue print for Federation rather than a fluid basis for the protection of rights or freedoms. The development of Constitutional rights or freedoms has remained the exclusive domain of Constitutional interpretation by the High Court of Australia:

[t]he year 1989 marked the point at which the High Court shifted from being a disinterested interpreter of constitutional rights to seeking to robustly construe such rights. The work of the Court today reflects this change, with the energy of its judges now focused on questions of rights rather than on its traditional case-load of Commonwealth powers and Australian federalism.⁵³

The text of the Australian Constitution provides little scope for the constitutional protection of the right to strike. However, judgments by the 1990's 'reformist' Mason High Court have left open the possibility that the right **could** find Constitutional protection.⁵⁴

The possibility for a Constitutionally protected right to strike comes from two decisions of the High Court made in 1992. *Nationwide News Pty Ltd v Wills* (*Nationwide News*)⁵⁵ and *Australian Capital Television Pty Ltd v Commonwealth* (*ACTV*),⁵⁶ held that the Constitution contains an implied freedom of political communication based upon the system of representative democracy enshrined within the Constitution, protecting communications necessary to facilitate representative democracy.⁵⁷ The decision in *Nationwide News* had a particularly industrial bent. At the time, provisions of the IR Act designed to protect the integrity of the AIRC made

⁵¹ G. Williams, *Human Rights Under the Australian Constitution* (Oxford University Press: South Melbourne, 2002). See specifically chapter 2, 'Human Rights and the Drafting of the Australian Constitution' at 25 – 45.

⁵² There are four main rights entrenched in the Australian Constitution: the free exercise of religion (s 116), non discrimination on the basis of residence in any State (s 117), the right not to be prevented from voting (s 41) and the right to jury trial for indictable offences (s 80).

⁵³ Williams, *supra* note 51 at 1.

⁵⁴ For discussion of the significant decisions made under the auspices of the Mason CJ High Court see P. Bailey, 'Righting the Constitution without a Bill of Rights' (1995) 23 *Federal Law Review* 1.

⁵⁵ (1992) 177 CLR 1.

⁵⁶ (1992) 177 CLR 106.

⁵⁷ For contemporary discussion of *Nationwide News* and *ACTV* see P. Creighton, 'The Implied Guarantee of Free Political Communication' (1993) 23 *University of West Australia Law Review* 163.

it an offence to use words likely to bring it or its members into disrepute, regardless of whether the commentary was true or false, or amounted to fair comment.⁵⁸ Four justices of the High Court (Brennan CJ, Deane, Toohey and Gaudron JJ) found that the provisions were a valid enactment under the conciliation and arbitration power, but they infringed the implied Constitutional freedom of political communication and were unconstitutional.

The finding of the existence of an implied freedom of political communication provides a basis for the possibility that there are further implied rights in the Constitution. Obiter dicta in *ACTV* suggested that the possibility of implied rights could extend further than the narrow freedom of political communication. In particular, Gaudron J expressly mentioned that protection of the system of representative democracy may extend to the implication of further freedoms, notably freedom of association,

[t]he notion of a free society governed in accordance with the principles of representative parliamentary democracy may entail freedom of movement, **freedom of association** and, perhaps freedom of speech generally.⁵⁹

Recognition by the High Court of an implied principle of freedom of association **could**, depending upon the interpretative approach taken to the implied principle, encompass a right to strike.

The development of protective implied rights within the Constitution was enhanced by a series of High Court decisions in 1994 consolidating the freedom of political communication. The decisions in *Theophanous v Herald and Weekly Times Ltd* (*Theophanous*),⁶⁰ *Stephens v West Australian Newspapers Ltd* (*Stephens*)⁶¹ and *Cunliffe v Commonwealth* (*Cunliffe*)⁶² established a broad freedom of political communication on the basis that the “freedom of political communication was a necessary concomitant of a general principle of representative democracy or

⁵⁸ The section impugned was the then, *Industrial Relations Act* 1988 (Cth), s 299(1)(d)(ii) which provided that it was an offence “by writing or speech [to] use words calculated to bring a member of the Commission or the Commission into disrepute”.

⁵⁹ *ACTV*, supra note 56 per Gaudron J at 210, emphasis added.

⁶⁰ (1994) 182 CLR 104.

⁶¹ (1994) 182 CLR 211.

⁶² (1994) 182 CLR 272.

representative government which permeated, or was 'enshrined' in the Constitution".⁶³

The holdings of the High Court in 1992 and 1994 led to speculation as to the possibility of the future development of implied rights. Kirk suggested that recognition by the High Court of the need to protect representative democracy could logically extend to the protection of other freedoms.⁶⁴ In his view:

[t]he constitutional implications that can reasonably be based upon representative democracy are the following: freedom of political communication, freedom of assembly for political purposes, freedom of association, freedom of movement...⁶⁵

Kirk acknowledged that a principle of freedom of association based upon the principle of representative democracy could theoretically be limited to freedom of **political** association but argued that such a restriction would not be consistent with the principle of representative democracy. A system of representative democracy requires communication to be free across a range of areas, including the social and economic.⁶⁶

Another author to examine the potential of implied freedoms, particularly with respect to freedom of association and the right to strike, was Doyle.⁶⁷ Doyle asserted that the right to strike could be encompassed by the freedom of political communication, given that an artificial distinction between communication for political purposes and industrial purposes (whereby strikes constitute a form of communication) is spurious and unsupportable.⁶⁸ Doyle argued that communications and actions of an industrial nature also require protection within a system of representative democracy.⁶⁹

[i]t is difficult to make a distinction between 'industrial' and 'political' communication. Secondly, even if the distinction were able to be made, it is

⁶³ M. Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Ashgate Publishing Company: Sydney, 2000) at 17; See also J. Kirk, 'Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37.

⁶⁴ Kirk, *supra* note 63.

⁶⁵ *Ibid* at 75.

⁶⁶ *Ibid* at 56.

⁶⁷ R. Doyle, 'The Industrial/Political Dichotomy: The Impact of the Freedom of Communication on Industrial Law' (1995) 8 *Australian Journal of Labour Law* 91.

⁶⁸ *Ibid* at 96.

⁶⁹ *Ibid* at 97.

unclear why a democratic society grants protection to 'political' communication which is not afforded to 'industrial' communication.⁷⁰

Despite these speculations, the 1994 decisions of the High Court turned out to be the "high watermark" of the implied freedom of political communication.⁷¹ The issues were reconsidered by the High Court in *Lange v Australian Broadcasting Corporation (Lange)*⁷² and *Levy v The State of Victoria and Ors (Levy)*,⁷³ where the court reformulated the principle of freedom of political communication and narrowed its potential scope.⁷⁴

The *Lange* and *Levy* decisions retreated from the broad formulation of freedom of political communication predominant in the earlier judgments. They confirmed the existence of the right, but shifted away from an implied right based upon a general principle of representative democracy 'enshrined' within the Constitution and adopted a formalistic text based interpretation. Whereas the principle of representative democracy relied upon in the earlier cases had been a general principle supporting the text of the Constitution, the new approach anchored the freedom strictly within the text. Stone argues that:

[i]n determining the scope of the freedom of political communication, it is now clear that the High Court will have regard to text and necessary structural implication, rather than a more generally defined concept of representative democracy.⁷⁵

The scope of the freedom of political communication was narrowed and defined, according to Chesterman, to encompass "communication on government or political matters which are or might be relevant to the making of informed decisions about voting in elections of members of the Commonwealth Parliament and in referenda to amend the Constitution".⁷⁶ This approach is significantly more restrictive than the previous general principle of representative democracy, leaving far less opportunity for expansive interpretation. The broader principle under the earlier decisions could

⁷⁰ Ibid at 96.

⁷¹ A. Stone, 'Case Note: Lange, Levy and the Direction of the Freedom of Political Communication under the Australian Constitution' (1998) 21 *University of New South Wales Law Journal* 117 at 117.

⁷² (1997) 189 CLR 520.

⁷³ (1997) 189 CLR 579.

⁷⁴ Ibid at 118.

⁷⁵ Stone, *supra* note 71 at 133.

⁷⁶ Chesterman, *supra* note 63 at 18.

have been expanded to support freedom of association and perhaps a right to strike. Given the absence of constitutional text on which to base such an expansion of the principle in future, it would seem that the *Lange* and *Levy* decisions have spelled an end, at least for the time being, of this possibility.

The current composition of the High Court militates against the possibility of further expansion of the principle of freedom of political communication. Both the *Lange* and *Levy* determinations were unanimous judgments, in line with a general retreat from a reformist agenda. It remains to be seen whether a future High Court will revisit the implied freedom and reinstate the wider earlier principle, however it is unlikely in the foreseeable future.

A final point to note is that even if the approach of the High Court were to alter in favour of less formalism, it is questionable whether the right to strike could ever be protected by the Constitution as it stands. Such a development would require either recognition of strike action as a political communication covered by the existing freedom, or recognition of an implied right to associate. Were an implied right to associate recognised by a future High Court, to include the right to strike it would need to be a functional right of association, encompassing collective activities and not an individualist libertarian conception of freedom of association. The Canadian Charter of Rights and Freedoms is a pertinent example. The inclusion of an express principle of freedom of association in the Canadian Charter of Rights and Freedoms did not lead to the recognition of the right to strike. The Canadian Supreme Court adopted a libertarian individualist approach to interpretation that excluded protection of a right to strike.⁷⁷ Any future enshrining of the principle of freedom of association or recognition of an implied freedom of association in Australia might face the same limitations.

⁷⁷ *Reference re Public Service Employee Relations Act* [1987] 1 SCR 313 (Alberta Reference Case); *Public Service Alliance of Canada v Canada* [1987] 1 SCR 424 (Public Service Alliance Case); *Retail, Wholesale and Department Store Union v Saskatchewan* [1987] 1 SCR 460 (Saskatchewan Dairy Workers Case); For further discussion see chapter 1 at 36-38.

The Impact of International Instruments in Domestic Law

This chapter has surveyed the possible domestic sources of an obligation to implement a right to strike. The remaining area to canvass is the obligation created under Australian law (if any) by the ratification of international instruments relating to the right to strike. Australia has made an international commitment to implement a right to strike. The discussion will now turn to the precise effect of that commitment in domestic legal terms.

Australia operates as a dualist system whereby a ratified international instrument does not apply automatically in domestic law. The executive arm of the federal government has the power under s 61 of the Constitution to enter into international instruments. Ratification provides the Commonwealth Parliament with the power to implement relevant legislation under the external affairs power of the Constitution. The High Court confirmed this in *Minister for Immigration and Ethnic Affairs v Teoh (Teoh)*:⁷⁸

[i]t is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law falls within the province of parliament, not the Executive.⁷⁹

Despite this lack of direct domestic effect, High Court jurisprudence has indicated that ratified instruments may have an **indirect** effect in three different areas, through the doctrine of legitimate expectations; through the interpretation of statutes; and through the development of the common law. Each of these will now be addressed in turn.

The Doctrine of Legitimate Expectations

In *Teoh* the High Court held that the ratification of an instrument in international law creates a 'legitimate expectation'.⁸⁰ The application of this principle to the domestic

⁷⁸ (1995) 128 ALR 353.

⁷⁹ Ibid at 361-362.

⁸⁰ *Teoh*, supra note 78 per Mason CJ, Deane, Toohey and Gaudron JJ at 362. For discussion of the doctrine of legitimate expectations and the decision in *Teoh* see A. Abadee, 'Keeping Government Accountable for its Promises: The Role of Administrative Law' (1998) 5 *Australian Journal of Administrative Law* 191; M. Allars, 'International Law and Administrative Discretion' in B. Opeskin

ratification of Treaties and Conventions was explored by Mason CJ and Deane J in their joint judgment:

[R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act ... Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention ... It is not necessary that the person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.⁸¹

The doctrine of 'legitimate expectations' is an administrative law principle that the publication of a policy or a representation concerning the process of administrative decision making by the Government creates a legitimate expectation that the policy or representation will be followed.⁸² Where an administrative decision-maker makes a decision which is inconsistent with a legitimate expectation, then persons affected by the decision should be given notice and an opportunity to present a case against the taking of such a course.⁸³ The right granted is a procedural right, a right to be heard where a decision would deviate from a legitimate expectation, and not a substantive right or remedy relating to the decision.

Di Felice argues that the decision in *Teoh* applies to the application of discretion in decision-making by members of the AIRC in the context of s 127 orders that industrial action cease or not occur.⁸⁴ Di Felice argues that the objects of the WRA which encompass both freedom of association and giving effect to Australia's international obligations,⁸⁵ may create a legitimate expectation with respect to AIRC decision-making and particularly the discretion under s 127.⁸⁶

and D. Rothwell, (eds.) *International Law and Australian Federalism* (Melbourne University Press: Melbourne, 1997), 232; W. Lacey, 'In the Wake of *Teoh*: Finding an Appropriate Government Response' (2001) 29 *Federal Law Review* 221; A. Twomey, '*Minister for Immigration and Ethnic Affairs v Teoh*' (1995) 23 *Federal Law Review* 348.

⁸¹ *Teoh*, supra note 78 at 365 per Mason CJ and Deane J (Gaudron J in agreement).

⁸² Twomey, supra note 80.

⁸³ Lacey supra note 80 at 223.

⁸⁴ Di Felice, supra note 41 at 346.

⁸⁵ WRA s 3(1).

⁸⁶ Ibid at 347-348.

Teoh is important in the context of the right to strike because the ratification of the ICESCR and ILO Conventions gives rise to a legitimate expectation in administrative decision-making. If Di Felice is correct, Australian ratification of the ICESCR and Convention 87 and 98 creates a legitimate expectation that the AIRC will exercise its decision-making function in accordance with the Conventions. With respect to the ILO Conventions, if the approaches of the CFA and CEACR are adopted, then this would include the right to strike. However, the impact of the doctrine is limited in practice. The AIRC would only have to take the Conventions into account in the exercise of their s 127 discretion and would be able to refer to the protected action regime as a positive enactment of the obligations contained under the Conventions.

A further complicating factor is that successive governments have sought to reverse the decision in *Teoh* through the release of 'executive statements' that the ratification of international instruments does not give rise to legitimate expectations. There have also been three Bills introduced into Parliament that have sought to reverse the effect of *Teoh*, all of which have lapsed.⁸⁷

Interpretation of Statutes

A second indirect effect of ratification relates to the interpretation of statutes. According to Walker, the decision of Mason CJ and Deane J (with the agreement of Gaudron J) in *Teoh* indicated that where a Treaty or Convention is referred to in legislation, the Treaty might be used as an aid to interpretation of the statute.⁸⁸ If no Treaty or Convention is mentioned, the court may refer to a Treaty that was ratified prior to the enactment of the statute in order to clarify any ambiguity within the provisions of the Act.⁸⁹ Walker argues that this approach reflects a presumption of interpretation that Parliament intends to give effect to Australia's international

⁸⁷ Allars, *supra* note 80 at 235-237; Lacey, *supra* note 80. The Bills were: *Administrative Decisions (Effect of International Instruments) Bill 1995* (Cth); *Administrative Decisions (Effect of International Instruments) Bill 1997* (Cth); *Administrative Decisions (Effect of International Instruments) Bill 1999* (Cth).

⁸⁸ K Walker, 'Treaties and the Internationalisation of Australian Law' in C. Saunders, (ed.) *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press: Annandale, 1996), 204.

⁸⁹ *Ibid* at 211. See also the decision of Brennan and Dawson JJ in *Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1 at 38.

obligations.⁹⁰ While the WRA does not specifically seek to give effect to international Treaties and Conventions with respect to the right to strike, one of the stated objects of the Act is to assist in giving effect to Australia's international obligations in relation to labour standards.⁹¹ If the approach suggested by Walker were to be adopted by the High Court, ambiguity with respect to provisions relating to the right to strike (protected action provisions) could be resolved in the light of ratified ILO Conventions. However, the recent High Court decision in *Electrolux Home Products Pty Ltd v Australian Workers' Union (Electrolux)*⁹² suggests that this approach has not been adopted by the current High Court. In *Electrolux*, ambiguities of interpretation with respect to immunities granted to strike action under the WRA were given a literal text based interpretation without any reference to international standards on the right to strike.

Development of the Common law

The third indirect effect relates to the development of the common law. Referring to the decisions of the High Court in *Mabo (No. 2)*,⁹³ *Dietrich v R*⁹⁴ and *Teoh*, Walker asserts that the use of international conventions in the development of the common law is well accepted by a majority of the High Court.⁹⁵ International treaties and Conventions may be used as an aid to the development of the common law in circumstances where there is a need to resolve ambiguity, uncertainty or lacunae.⁹⁶ However, Walker is unsure whether an international treaty or convention would be sufficient, on its own, to justify a change in the common law.⁹⁷

Conclusion

This chapter has surveyed potential sources of an enforceable obligation under Australian law to implement a right to strike. Beginning with the enactment of a right to strike by the Reform Act, moving through the WRA, the Australian Constitution

⁹⁰ Walker, *supra* note 88 at 211.

⁹¹ WRA s 3(1).

⁹² [2004] HCA 40, 2 September, 2004, unreported judgment.

⁹³ (1992) 175 CLR 1.

⁹⁴ (1992) 177 CLR 292.

⁹⁵ Walker, *supra* note 88 at 217.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

and international obligations, the chapter has considered whether there is any explicit or implicit mechanism creating an obligation.

The IR Act (as amended) and the WRA represent limited legislative enactments of the right to strike, but neither constitutes a source of binding obligation. Such Acts can be repealed at the will of the Commonwealth Parliament. In this respect, the right to strike has no more claims to permanence, or to an independent existence, than any other right in Australia that is not Constitutionally entrenched. With respect to the Australian Constitution, the chapter demonstrated that as presently interpreted there is no scope for mandating recognition of a right to strike. Ratified international instruments may have indirect effect on the development of the common law, judicial interpretation of statutes and under the administrative law doctrine of legitimate expectations. However, the dualist nature of treaty implementation in Australia means that the Commonwealth Parliament is under no direct domestic mandate to implement the terms of such instruments.

Where does this leave the right to strike in domestic law? The only clear conclusion is that Australian workers do not possess a right to strike that is enforceable beyond the limits of any right enacted within legislation. At present there is no constitutionally entrenched right that may be called upon and international law only has indirect domestic effects. As to the future, there are two avenues through which an obligation to respect a right to strike may develop. These avenues are the Constitutional freedom of political communication and the development of a general law right to strike.

With respect to the implied freedom of political communication, the potential exists for a future High Court to depart from the literalist textual interpretation of the Constitution. If this occurred there is scope for the development of a right to strike under an implicit protection of freedom of association. However, if the freedom of political communication extended to freedom of association, the implied freedom could be limited by an individualist interpretation of the freedom excluding the right to strike. Further any concomitant freedom of association could constitute a freedom of **political** association rather than industrial association, thus limiting the potential scope of the freedom. The development of a constitutionally entrenched right would

represent the most effective option, but it is also extremely unlikely given the political and legal factors discussed in this chapter.

The second possible avenue relates to the decision in *National Workforce* which suggested that in Australia there may exist some 'generally recognised right to strike.' However, the court did not articulate the source or content of the right and noted that any such right has been entirely abrogated by the WRA in the federal regime. It could be argued that scope exists for the development of a 'generally recognised right to strike' under the common law, in areas in which the WRA does not cover. For example, as will be discussed in the next chapter, the law of picketing does not fall within the definition of industrial action under the WRA, and remains almost entirely within the purview of the common law and other relevant legislation. The future legal development of picketing could be affected by this 'generally recognised right to strike.' However, this option would not produce a strong right to strike given the existence of the WRA and the ability of Parliament to override the common law.

Chapter Six

The Regulation of Industrial Action in Australia

Introduction

The preceding chapter conclusively demonstrated the absence of a constitutionally or otherwise entrenched right to strike in Australian law. Consequently, Australian workers do not possess a right to strike enforceable beyond the limits of any right enacted within a legislative regime. This chapter will explore the existing regulation of strike law in Australia, providing the substantive basis upon which the assessment of compliance with international law will be undertaken. The discussion will begin with the underlying common law position of strike action in Australia, illustrating the legal consequences that may attach to strike action that is unprotected by legislation.

Industrial Action and the Common Law

At common law, it is generally correct to state that strike action will constitute a repudiatory breach of contract by the employee. This provides the basis in law for the employer to terminate the employment contract in response to the repudiation. This proposition is the foundation of all substantive common law doctrines relating to strike action.

Strike as a Breach of the Employment Contract

There is no special provision or latitude in the law of contract for strike action; it is approached through the application of the rules of contract law.¹ An employee owes a duty to obey the lawful and reasonable commands of an employer.² Failure to obey such commands will generally constitute a repudiatory breach of contract by the employee: “[a]s a general rule it can be safely said that the participation by workers in

¹ M. Vranken, ‘Strike and the Individual Employment Contract: The New Zealand Case’ (1989) 19 *Victoria University of Wellington Law Review* 249 at 253.

² *R v Darling Island Stevedoring and Lighterage Company* (1938) 60 CLR 601; *Laws v London Chronicle* [1959] 1 WLR 698 per Evershed LJ at 700: “It is, no doubt, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.”

a strike or other industrial action will be regarded as a breach of contract by those concerned".³

The English common law position with respect to strike action and breach of contract has been authoritatively determined. In the English case of *Morgan v Fry*,⁴ Lord Denning had asserted:

The truth is that neither employer nor workman wish to take the drastic action of termination if this can be avoided. The men do not wish to leave their work forever. The employers do not wish to scatter their labour force to the four winds. Each side is, therefore, content to accept a 'strike notice' of proper length as lawful. It is an implication read into the contract by the modern law as to trade disputes. If a strike takes place, the contract of employment is not terminated. It is suspended during the strike; and revives again when the strike is over.⁵

This 'suspension' theory was rejected in the subsequent House of Lords judgment *Miles v Wakefield Metropolitan District Council (Miles)*,⁶ where Lord Templeman reasserted the traditional common law position:

[a]ny form of industrial action undertaken by a worker is a breach of contract which entitled the employer at common law to dismiss the worker because no employer is contractually bound to retain a worker who is intentionally causing harm to the employer's business.⁷

The decision in *Miles* was approved in Australia in *Ansett (Operations) v Australian Federation of Air Pilots (Ansett)*⁸ where Brooking J rejected propositions put to the court that strike action acted as suspension of the contract of employment rather than repudiatory breach of contract. Earlier decisions of Australian courts and tribunals had been more cautious with respect to the effect of strike action on the common law employment contract. In an early decision Griffith CJ indicated that strike action on the part of an employee does not evidence an intention to bring the contract of employment to an end sufficient to demonstrate repudiatory conduct.⁹ Further, Macken J sitting on the NSW Industrial Relations Commission in 1987 rejected the argument that strike action gives rise to an automatic right to summarily dismiss an

³ K. D. Ewing, 'The Right to Strike in Australia' (1989) 2 *Australian Journal of Labour Law* 18 at 18.

⁴ [1969] 2 QB 710.

⁵ *Ibid* per Denning L at 728.

⁶ [1987] 2 WLR 795.

⁷ *Ibid* per Templeman L at 1097.

⁸ [1991] 1 VR 637.

employee.¹⁰ However, the decision in *Ansett* is the most recent and authoritative case on this point. It suggests that despite judicial resistance to the notion that strike action always constitutes repudiatory breach, this appears to be the current position under the common law.¹¹

In practical terms, the effect of the common law is that all forms of strike action by an employee will constitute repudiation of contract. Creighton and Stewart note that even 'work to rule' campaigns where parties perform their contracts to the letter can constitute repudiation where it represents a failure to cooperate.¹²

In recognition of the harsh application of this rule in practice, commentators have suggested that a strike should operate to suspend a contract of employment, enlivening the contract at the end of the action.¹³ This concept of contractual 'suspension' reflected in the decision of Lord Denning in *Morgan v Fry*, has been adopted in many civil law countries in Europe but has not found favour within common law jurisdictions.¹⁴

A final point to note in the context of strike as breach of contract is the impact of unfair dismissal legislation. The *Workplace Relations Act* 1996 (Cth) (WRA) provides an avenue for employees to request reinstatement where a dismissal has occurred in

⁹ *R v Commonwealth Court of Conciliation and Arbitration; Ex Parte BHP Co Ltd* (1909) 8 CLR 419.

¹⁰ *Re Federated Storemen and Packers Union of Australia, NSW Branch* (1987) 22 IR 198.

¹¹ For discussion of strike action as repudiatory breach of contract and the Australian case law on this matter see B. Creighton and A. Stewart, *Labour Law: An Introduction* (3rd ed., Federation Press: Sydney, 2000) at 399 – 400; Ewing, *supra* note 3; K. D. Ewing, *The Right to Strike* (Clarendon Press: Oxford, 1991) at 5 – 9; M. J. Pittard and R. B. Naughton, *Australian Labour Law: Cases and Materials* (4th ed., Butterworths: Chatswood, 2003) at 300 – 302.

¹² Creighton and Stewart, *supra* note 11 at 395 citing the English case of *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455 where a work to rule campaign was held to be a breach of the contractual duty of cooperation.

¹³ See for example, P. Elias, 'The Strike and Breach of Contract: A Reassessment' in K. Ewing, C. Gerty and B. Hepple, (eds.) *Human Rights and Labour Law: Essays for Paul O'Higgins* (Mansell Publishing Limited: London, 1994), 257; Ewing, *supra* note 3; Vranken, *supra* note 1.

¹⁴ A. Jacobs, 'The Law of Strikes and Lockouts' in R. Blanpain and C. Engels, (eds.) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, (7th ed., Kluwer Law International: The Hague, 2001), 585. For discussion of strike as a breach of contract as opposed to strike as a suspension of contract see R. Ben-Israel, 'Introduction to Strikes and Lock-outs: a Comparative Perspective' in R. Blanpain and R. Ben-Israel, (eds.) *Strikes and Lock-Outs in Industrialised Market Economies* (Kluwer Law and Taxation Publishers: Deventer, 1994), 1 at 19 – 23; Elias, *supra* note 13 at 257.

accordance with the common law but is considered to be unfair.¹⁵ Significantly the availability of this legislative remedy does not affect the common law position. This is important because the fact that the act of strike is a breach of contract at common law provides the element of unlawfulness necessary for many of the potential actions that may be brought against strikers under the common law industrial torts.¹⁶

No work – No pay

The employment relationship between an employer and employee rests upon the simple formula of work for wages, whereby the employee provides work and in return the employer provides wages. Wages cannot be earned without concomitant service.¹⁷ As industrial action usually entails work stoppage, the failure of employees to perform work will result in the loss of the right to wages with no general entitlement to proportional payment for partial performance unless the employer can be shown to have accepted the part performance.¹⁸

There is no general provision under the common law to stand down or suspend an employee without pay for the pursuit of industrial outcomes.¹⁹ If the employer has no work for the employee to perform, they must either terminate the employment contract or pay the employee. At common law, in the absence of express contractual,

¹⁵ *Workplace Relations Act 1996* (Cth) (WRA) Part VIA, Division 3. The application of Division 3 is limited, and certain classes of employee are excluded from the application of the provisions.

¹⁶ The industrial torts are discussed below at page 164.

¹⁷ *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435 per Dixon J at 465: "The common understanding of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from service means that the wages or salary cannot be earned however ready and willing the employee may be to serve and however much he stand by his contract and decline to treat it as discharged by the breach." This point was affirmed by the High Court in *Byrne v Australian Airlines* (1995) 131 ALR 422 per Brennan CJ, Dawson and Toohey JJ, at 432: "Of course, even if an employee who is wrongfully dismissed chooses to keep the contract of employment on foot, he or she cannot claim remuneration in respect of any period after the wrongful dismissal because the right to receive remuneration for services is dependent upon the services having been rendered." For discussion of the pre *Byrne* debate see G. McCarry, 'No work, No pay' (1983) 57 *Australian Law Journal* 378; G. McCarry, 'No work, No pay: A Replication to Shaw QC and McClelland' (1987) 3 *Australian Bar Review* 174; J. W. Shaw and R. McClelland, 'Selective Work Bans: No Work, No Pay Revisited' (1986) 2 *Australian Bar Review* 250.

¹⁸ *Australian National Airlines Commission v Robinson* [1977] VR 87; *Csomore v Public Service Board (NSW)* (1986) 17 IR 275.

¹⁹ *Hanley v Pease and Partners Ltd* [1915] 1 KB 698; *Devonald v Rosser and Sons* [1906] 2 KB 728; *Re Application by Building Workers' Industrial Union of Australia* (1979) 41 FLR 192, per Sweeney J at 194: "There [is] no existing right in the employer to deduct payment in the circumstances set out (strike, lack of employment availability etc) at common law". For discussion see R. McCallum,

statutory, award or industrial agreement clauses to the contrary, an employer remains liable for wages so long as the employee remains ready willing and able to perform the contract.²⁰

Criminal Liability

Criminal liability for strike action is an historical anachronism, which persists only in so far as relevant laws remain on the statute books. As Sykes notes, criminal liability for strike action and the legislation from which it developed, “belong to a past era of development and have contributed little to the modern legal situation”.²¹ In Australia, there are only two forms of residual criminal liability, the Commonwealth *Crimes Act* 1914²² and the possible criminal liability that may attach to picketing action in some jurisdictions.

Strike action that involves picketing is particularly disruptive of the business of the relevant employer and may be disruptive to other users of the target business. The act of picketing itself has historically been criminally actionable under the crime of watching and besetting, although State criminal legislation generally provides an exception for picketing involving the peaceful communication of information.²³ As a strike tactic that involves the use of public space and potential public disruption, strikers engaged in picketing action may also be left open to a range of potential liability for public order offences including traffic or breaching the peace offences.²⁴

‘Exploring the Common Law: Lay-Off, Suspension and the Contract of Employment’ (1989) 2 *Australian Journal of Labour Law* 211.

²⁰ For examples of the interaction of the common law with award clauses enabling the withholding of payment in certain circumstances see *Gapes v Commercial Bank of Australia* (1980) 37 ALR 20; *Welbourn v Australian Postal Commission* [1984] VR 257.

²¹ E. I. Sykes, *Strike Law in Australia* (2nd ed., Law Book Company: Sydney, 1982) at 101.

²² For further discussion of the *Crimes Act* 1914 (Cth) see below at 223-224.

²³ For discussion of the crime of watching and besetting and the informational or ‘persuasional’ picketing exception see B. Creighton, W. Ford and R. Mitchell, *Labour Law: Materials and Commentary* (2nd ed., Law Book Company: Sydney, 1993) at 1264-1266; Sykes, *supra* note 21 at 132-151.

²⁴ See for example *Dollar Sweets Pty Ltd v Federated Confectioners Association of Australia and Others* [1986] VR 383; *R v Commissioner of Police (Tas.), Ex Parte North Broken Hill Ltd (Trading as Associated Pulp and Paper Mills and APPM)* (1992) 1 Tas R 99; 44 IR 214. For discussion of this decision see M. Otlowski, ‘The Legal Fallout from the APPM Dispute (1992) 5 *Australian Journal of Labour Law* 287.

Industrial Torts

The term 'industrial torts' refers to a group of tortious actions that can be used against a trade union or employees in the context of strike action. The torts have been adequately canvassed in the literature in this area, so it is not necessary to explore them in detail.²⁵ For the purposes of this discussion, it is necessary to understand that the industrial torts create potential tortious outcomes where actions taken by persons in combination with other persons involve an unlawful act. The unlawful act is usually furnished through the breach of contract occasioned by a strike. For example, the tort of conspiracy by unlawful means applies where two or more people acting in combination deliberately inflict loss on the plaintiff through an independently unlawful act.²⁶ One act that will furnish the unlawful element is the breach of the employees' contract resulting from employee strike action.²⁷ Another industrial tort targeting trade unions is the tort of interference with contractual relations. It will be a tort to knowingly and intentionally interfere with the plaintiffs contractual relations where that would cause damage to the plaintiff.²⁸ When a trade union calls a strike, it is knowingly and intentionally interfering in the target employers' employment contracts.

The danger in the industrial torts for trade unions and employees lies in the ability of employers to utilise the torts to obtain interlocutory injunctions, final injunctions and compensation for losses suffered during the course of a strike. First, an employer may obtain an interlocutory injunction without establishing the tort itself, merely that there

²⁵ See Creighton, Ford and Mitchell, *supra* note 23 at chapter 34; Creighton and Stewart, *supra* note 11 at 403 – 411; Pittard and Naughton, *supra* note 11 at chapter 17; Sykes, *supra* note 21 at chapter 8. For recent coverage of the development of the industrial torts in Britain see G. S. Morris and T. J. Archer, *Collective Labour Law* (Hart Publishing: Oxford, 2000) at 389 – 434.

²⁶ See for example *Williams v Hursey* (1959) 103 CLR 30; *Ansett Transport Industries v Australian Federation of Air Pilots* (1989) 95 ALR 211; *Maritime Union of Australia v Patrick Stevedores No 1 Pty Ltd* (1998) 153 ALR 602. For specific discussion of the tort of conspiracy by unlawful means see M. Otlowski, 'The Demise of Conspiracy by Unlawful Means? Future Directions for Australia' (1989) 2 *Australian Journal of Labour Law* 107.

²⁷ As discussed in Creighton, Ford and Mitchell, *supra* note 23 at 1181 – 1189, the 'unlawful' element in this tort may be furnished by a breach of statute, a common law illegality or a breach of contract.

²⁸ The earliest recognition of this tort was in the case of *Lumley v Gye* (1853) 2 E & B 216 in a non industrial context. However, the tort was soon adapted to the industrial context, see: *Thomson v Deakin* [1952] Ch. 646. Recent Australian cases where commission of the tort has been argued include *Dollar Sweets*, *supra* note 24; *Ansett* *supra* note 26; *Building Workers Industrial Union of Australia v Odco* (1991) 29 FCR 104 (the *Troubleshooters Case*).

is a serious question to be answered and the balance of convenience favours the grant of an injunction.²⁹ Such an injunction will usually cause strike action to cease immediately. Second, if the trade union disobeys the injunction it may face significant fines for contempt of court.³⁰ Third, if the matter proceeds to trial on the tortious action for a final injunction, the employees or trade union concerned could also be pursued for the loss suffered by the employer and possibly others who deal with the employer through the commission of the relevant tort.³¹ The loss suffered will often be greatest where the strike is most successful, as after all, the point of the strike is to inflict damage.

This discussion has briefly canvassed the underlying common law and criminal law position of industrial action in Australia and will now examine the legislation that affects the common law position. However, it is important to note that where protection for industrial action from the common law is not granted by statute, liability under breach of contract and the industrial torts remains a distinct possibility. The essential point is that industrial action will almost always constitute a breach of contract constituting repudiation, and this unlawfulness will found liability for damages or injunctive relief in a number of tortious actions for damage inflicted by strike action.

²⁹ *American Cyanamid v Ethicon* [1975] AC 396.

³⁰ An example of the attitude of the court to industrial action undertaken in breach of injunctive relief is found in: *Australian Industrial Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union of Australia and Ors* (2001) 188 ALR 653 per Merkel J at 658, "The failure by all persons interested to seek to enforce the penalty order punishing Mr Johnston for his wilful contempt of court had the potential to bring the administration of justice into disrepute. That is especially so in view of Mr Johnston's continuing wilful and public defiance of the order."

³¹ For example in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2000] FCA 708 (29 May 2000), the Federal Court imposed individual fines of \$20,000 each on two union officials who acted in breach of an injunction and were found to be in contempt of court. The Court in *Ansett*, supra note 26 found that the Australian Federation of Airline Pilots had committed the torts of interference with contractual relations (between airline pilots and employers; between employers and their contractors), actual inducement of breach of contract, interference with trade or business by unlawful means and civil conspiracy by unlawful means. The damages awarded were \$6.5 million, although they were not actually paid out. For discussion see K. McEvoy and R. Owens, 'The Flight of Icarus: Legal Aspects of the Pilots Dispute' (1990) 3 *Australian Journal of Labour Law* 87.

The Regulation of Industrial Action under the WRA

Introduction – A Coherent Ideological Foundation?

The federal labour law system regulated by the WRA is neither conciliation and arbitration nor collective bargaining. Rather, it is a uniquely Australian hybrid, embracing elements from each system. Within this model, the role of industrial action is ambiguous. At best, the model embodies an ideological commitment to the role and importance of strike action in a collective bargaining regime. At worst, the continued inclusion of the right to strike within the model was a pragmatic political concession, included to ensure the passage of the *Workplace Relations and Other Legislation Amendment Act 1996* (Cth) (WROLAA) through the Australian Senate.³²

The discussion will now canvass the regulation of industrial action within the WRA in order to provide a succinct statement of the law to date, and to seek to ascertain whether the right to take strike action within the WRA proceeds from a coherent and rational foundation. The passage of the WROLAA may have been intended to embody a coherent vision for collective bargaining and strike action, but the compromise in the Senate, the continued presence of pre-existing provisions of the *Industrial Relations Act 1988* (Cth) and subsequent amending legislation have meant that industrial relations regulation continues to be haphazard rather representative of a vision for the regulation of strike action.

The WROLAA sought to implement a system of both individual and collective bargaining supported by strike action. It is appropriate to assess that model in the context of a normative system of voluntary collective bargaining, based upon the model expounded within ILO principles. Consequently, this chapter and the next will provide an outline of the Australian bargaining model and the right to take protected industrial action, endeavouring to find a coherent ideological basis for the regulation of strike action within that system. This will establish a legal framework for the assessment of compliance of Australian law to be undertaken in chapter 8.

³² See *Agreement between the Commonwealth Government and the Australian Democrats on the Workplace Relations Bill*, released October 1996. For discussion of the agreement see M. Pittard, 'Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements' (1997) 10 *Australian Journal of Labour Law* 62 at 63 – 64.

In addition to outlining the present law, where appropriate, relevant Bills introduced into the Commonwealth Parliament to amend the WRA will be canvassed. Beginning with the omnibus *Workplace Relations (More Jobs, Better Pay) Bill* (Cth) in 1999, and then smaller, single issue Bills, there have been numerous unsuccessful attempts to amend the WRA.³³ These Bills illustrate the diverse ideological and structural difficulties in attempting to distil an overarching approach to strike action within the bargaining model. Further, they offer insight into likely future changes to the Act given the prevailing political climate.³⁴

The WRA Model of Voluntary Collective Bargaining

The federal bargaining model enables parties to bargain over terms and conditions of employment, with particular focus on agreements entered into at the workplace or enterprise level. The fundamental tenets of the model are expressed in the principal objects of the WRA, and emphasise the centrality of enterprise level bargaining and the role of arbitration in maintaining a 'safety net' of employment conditions.³⁵

However, the objects offer no insight into the role or ideological foundation of strike action within the model.

Definition of Industrial Action under the WRA

Section 4 defines "industrial action", for the purposes of the WRA (with the exception of Part XA).³⁶

Industrial action (except in Part XA) means:

³³ For an overview of the changes that were proposed in the *Workplace Relations (More Jobs, Better Pay) Bill* 1999 (Cth) see C. Jones, 'Second Wave Assault on Unprotected Industrial Action' (1999) 5 *Employment Law Bulletin* 35; M. Pittard, 'Change Upon Change: More Second Wave IR Reforms' (1999) 5 *Employment Law Bulletin* 53.

³⁴ The Coalition Government has held office in Australia since 1996 and was re-elected for a fourth consecutive term on Saturday October 9, 2004.

³⁵ The principal object of the WRA expressed in s 3 is to "provide a framework for cooperative workplace relations, which promotes the economic prosperity and welfare of the people of Australia". Section 3(b) provides that it is an object of the WRA to ensure the means:

- (i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and
- (ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment.

³⁶ Section 298B, Part XA, Freedom of Association, contains a similar definition applicable for the purposes of Part XA.

- (a) the performance of work in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work, the result of which is a restriction or limitation on, or a delay in, the performance of the work, where:
 - (i) the terms and conditions of the work are prescribed, wholly or partly, by an award or an order of the Commission, by a certified agreement or AWA, by an award, determination or order made by another tribunal under a law of the Commonwealth or otherwise by or under a law of the Commonwealth; or
 - (ii) the work is performed, or the practice is adopted, in connection with an industrial dispute;
- (b) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, in accordance with the terms and conditions prescribed by an award or an order of the Commission, by a certified agreement or AWA, by an award, determination or order made by another tribunal under a law of the Commonwealth or otherwise by or under a law of the Commonwealth;
- (c) a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, that is adopted in connection with an industrial dispute; or
- (d) a failure or refusal by persons to attend for work or a failure or refusal to perform any work at all by persons who attend for work, if:
 - (i) the persons are members of an organization and the failure or refusal is in accordance with a decision made, or direction given, by an organization, the committee of management of the organization, or an officer or a group of members of the organization acting in that capacity; or
 - (ii) the failure or refusal is in connection with an industrial dispute; or
 - (iii) the persons are employed by the Commonwealth or a constitutional corporation; or
 - (iv) the persons are employed in a Territory;

but does not include:

- (e) action by employees that is authorised or agreed to by the employer of the employees; or
- (f) action by an employer that is authorised or agreed to by or on behalf of employees of the employer; or
- (g) action by an employee if:

- (i) the action was based on a reasonable concern by the employee about an imminent risk to his or her health or safety; and
- (ii) the employee did not unreasonably fail to comply with a direction of his or her employer to perform other available work, whether at the same or another workplace, that was safe and appropriate for the employee to perform.

This definition covers a wide range of possible industrial activities. In addition to total work stoppage, the definition is capable of covering work bans, go slows, rolling stoppages and work to rule. Further, it is capable of encompassing individual industrial action. However, there is no obvious section that covers picketing. This is significant because if picketing is not covered by the definition, picketing cannot be considered to be industrial action for the purposes of accessing the protection from liability available under the protected action provisions. Therefore, where parties operate a picket in the context of otherwise protected industrial action they could be exposed to common law liability.

The Federal Court examined this issue in the case of *Davids Distribution Pty Ltd v National Union of Workers*.³⁷ It was argued before the court that paragraph (c) of the definition of industrial action: “a ban, limitation or restriction on the performance of work, or on acceptance of or offering for work, that is adopted in connection with an industrial dispute” is capable of encompassing picketing whereby those involved in the picket are imposing a ban, restriction or limitation on the performance of their own work. The court noted that the suggested construction was open on the literal text of the section, however policy considerations dictated against the interpretation.³⁸ The majority held that peaceful picketing does not involve a ban, limitation or restriction on the performance of work in connection with an industrial dispute:

[a]ctivity that merely involves communication of information to persons entering or leaving the site is not industrial action within the meaning of the definition in the WRA. Such activity clearly cannot constitute a ban, limitation or restriction on the performance of work by the picketers. If the picketers do no more than communicate information, it is immaterial that the recipient of

³⁷ (1999) 91 FCR 463. The leading judgment was delivered by Wilcox and Cooper JJ, while Burchett J delivered a dissenting opinion. For further discussion of the decision see J. Howe, ‘Picketing and the Statutory Definition of *Industrial Action*’ (2000) 13 *Australian Journal of Labour Law* 84.

³⁸ Ibid at 486 per Wilcox and Cooper JJ.

the information may be persuaded not to perform, accept or offer for work.³⁹

Even where picketing ceases to be peaceful, or purely informational, it will not come under the statutory definition.⁴⁰ The majority argued that to determine otherwise would provide statutory immunities for protected industrial action involving picketing, thus abrogating common law remedies for non-informational picketing:

[t]o interpret paragraph (c) of the definition of industrial action in such a way as to include picketing infringing upon the rights and freedoms of others, would be to confer statutory immunity on such conduct It would authorise interference with the rights, not only of the employer, but also of other affected persons who, but for the immunity, would have a right of action at common law.⁴¹

The decision in *Davids Distribution* was applied in *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union*⁴² and appears to represent an established position with respect to the relationship between the definition of industrial action and picketing conduct.

Certified Agreements

The WRA bargaining model under Part VIB and VID, consists of two types of agreements: Division 2 agreements and Division 3 agreements.⁴³

WRA Part VIB, Division 2 provides for the certification of agreements between employers who are constitutional corporations or the Commonwealth and groups of employees or organizations of employees in single businesses.⁴⁴ Section 170LJ

³⁹ Ibid.

⁴⁰ Ibid at 491 per Wilcox and Cooper JJ.

⁴¹ Ibid.

⁴² (2002) 112 IR 388 at 393. This decision of Kenny J in the Federal Court was affirmed by the Full Court of the Federal Court in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2003) 125 IR 449.

⁴³ For in depth discussion of the WRA bargaining model see Creighton and Stewart supra note 11 at 148 – 200; Pittard, supra note 32.

⁴⁴ WRA s 170LH.

A “single business” is defined for the purposes of Part VIB of the WRA in s 170LB as:

(1) For the purposes of this Part, a *single business* is:

- (a) a business, project or undertaking that is carried on by an employer; or
- (b) the activities carried on by:
 - (i) the Commonwealth, a State or a Territory; or
 - (ii) a body, association, office or other entity established for a public purpose by or under a law of the Commonwealth, a State or a Territory; or
 - (iii) any other body in which the Commonwealth, a State or a Territory has a controlling interest.

provides for agreements to be certified between the Commonwealth or a Constitutional corporation and an organization of employees, where the organization has at least one member employed in the single business or part thereof whose employment will be subject to the agreement and the organization is entitled to represent the industrial interests of the member in relation to the work that will be subject to the agreement. Approval must be obtained from a valid majority of the persons employed at the time whose employment will be subject to the agreement.⁴⁵

Section 170LK provides for the certification of agreements between an employer who is the Commonwealth or a Constitutional corporation and a group of employees.⁴⁶ As with s 170LJ agreements, such agreements must be approved by a valid majority of those employed at the time whose employment will be subject to the agreement.

Section 170LK agreements can be negotiated between an employer and their employees without the involvement of any employee organizations and where they are involved, they are not parties to any subsequent agreement.⁴⁷

WRA Part VIB, Division 3 provides for the certification of agreements between parties to an industrial dispute in a single business.⁴⁸ These agreements may be entered into by an employer, carrying on a single business, which is or was party to an industrial dispute and one or more organizations of employees, in order to settle the

(2) For the purposes of this Part:

- (a) if 2 or more employers carry on a business, project or undertaking as a joint venture or common enterprise, the employers are taken to be one employer; and
- (b) if 2 or more corporations that are related to each other for the purposes of the *Corporations Act 2001* each carry on a single business:
 - (i) the corporations may be treated as one employer; and
 - (ii) the single businesses may be treated as one single business.

(3) For the purposes of this Part, a *part* of a single business includes, for example:

- (a) a geographically distinct part of the single business; or
- a distinct operational or organizational unit within the single business.

⁴⁵ WRA s 170LJ(2).

⁴⁶ WRA s 170LK(1).

⁴⁷ Under s 170LK(4) an employer must give all employees notice that any relevant proposed party to the agreement who is a member of an organization that is entitled to represent their industrial interests in relation to the work in question, may request the organization to represent the person in meeting and conferring with the employer about the agreement. Where a member of the organization involves an organization, the employer must give the organization a reasonable opportunity to meet and confer with the employer about the agreement – s 170LK(5).

⁴⁸ WRA s 170LN provides that Division 3 of Part VIB covers agreements entered into:

- (a) to settle, further settle or maintain the settlement of, or to prevent, industrial disputes; or
- (b) to prevent industrial situations from giving rise to industrial disputes.

dispute, maintain a settlement or prevent further disputes.⁴⁹ Agreements under Division 3 must be approved by a valid majority of the persons employed at the time whose employment will be subject to the agreement.⁵⁰

The AIRC is responsible for certifying Division 2 and Division 3 agreements. To obtain certification, an agreement must pass the 'no-disadvantage test', that is, the agreement must not disadvantage employees in relation to their terms and conditions of employment under a relevant award.⁵¹ If the only reason an agreement is not certified is because it does not pass the no-disadvantage test, the agreement will be taken to have passed the test if the AIRC is satisfied that certifying the agreement is not contrary to the public interest.⁵²

Once certified, Division 2 and Division 3 agreements apply until their nominal expiry date passes and they are replaced by a subsequent agreement.⁵³ While in operation they prevail over any award or order of the AIRC or prior agreement to the extent of any inconsistency with that award or order, and bind successor employees and employers.⁵⁴

Certification of Multiple Business Agreements

There is facility within the WRA for the certification of multiple-business agreements where the Full Bench of the AIRC is satisfied that the agreement is in the public

⁴⁹ WRA s 170LO.

⁵⁰ WRA s 170LR.

⁵¹ WRA s 170LT(2) and 170XA. For discussion of the no-disadvantage test and see O. Merlo, 'Flexibility and Stretching Rights: the No Disadvantage Test in Enterprise Bargaining' (2000) 13 *Australian Journal of Labour Law* 207; R. Mitchell, R. Campbell, A. Barnes, E. Bicknell, K. Creighton, J. Fetter and S. Korman, *Protecting the Worker's Interest in Enterprise Bargaining: The 'No Disadvantage' Test in the Australian Federal Jurisdiction*, Final Report, Prepared for the Workplace Innovation Union, Industrial Relations Victoria, (Centre for Employment and Labour Relations Law, University of Melbourne: Parkville, 2004). The no-disadvantage test will only remain a valuable tool for protecting employee terms and conditions under certified agreements as long as the award system remains relevant. In the Federal Court in obiter dicta Ryan J remarked, "[i]t may be that, in future, if the designated award that provides the criteria for the application of the no-disadvantage test is not adjusted to reflect market trends evidenced by relevant certified agreements and Australian Workplace Agreements, the utility of the no-disadvantage test in ensuring minimum standards will gradually diminish": *Maritime Union of Australia v Burnie Port Corporation Pty Ltd* (2000) 101 IR 435 at 451.

⁵² WRA s 170LT(3). Subsection (4) provides an example of a case where the AIRC may be satisfied that certifying an agreement is not contrary to the public interest: where making the agreement is part of a reasonable strategy to deal with a short term crisis in, and to assist the revival of, the single business or part.

⁵³ WRA s 170LX(2).

interest, having regard to whether the matters could be more appropriately dealt with by a single business agreement.⁵⁵ A multiple-business agreement will have no effect in so far as it is inconsistent with a single business agreement.⁵⁶ The protected action provisions examined later in this chapter do not apply to negotiations for a multiple-business agreement.⁵⁷

Australian Workplace Agreements

The other form of agreements catered for under the WRA are Australian Workplace Agreements (AWAs) and allow for an individual employer who is a Constitutional corporation, the Commonwealth or is in Victoria or a Territory, and an individual employee to enter into an agreement establishing the terms and conditions of the employee's employment.⁵⁸ In order to be valid (AWAs have no effect except as provided under Part VID), the AWA must be filed with the Office of the Employment Advocate, must comply with filing requirements and pass the no-disadvantage test. Once approved, an AWA operates to the exclusion of any relevant award that would otherwise apply and prevails over pre-existing certified agreements, where that possibility has not otherwise been excluded within the terms of the certified agreement.⁵⁹

The Role of the AIRC and Arbitration

While the system has moved inexorably away from tribunal arbitration and national uniform standards towards enterprise bargaining, there remains a role for the AIRC and the processes of conciliation and arbitration. Creighton and Stewart note that it is

⁵⁴ WRA s 170LY.

⁵⁵ WRA s 170LC. For examples of successful applications to certify multi-business agreements see *Application for Certification of Multiple Business Agreement by Ambulance Service Victoria – Metropolitan and Ors* (1999) 45 AILR para 4-013; *Application for Certification of Multiple Business Agreement by McDonald's Australia Limited and the Shop, Distributive and Allied Employees Association*, AIRC PR 943252, 30 January 2004, per Munro J, Drake SDP and Thatcher C.

⁵⁶ WRA s 170LC(5).

⁵⁷ WRA s 170LC(6).

⁵⁸ Part VID, ss 170VC; 170VF and 495 (Victoria). The Act also allows for the negotiation of AWAs covering waterside workers, maritime employees and flight crew officers where the employees' employment is in connection with constitutional trade and commerce: WRA ss 170VC(d), (e) and (f). For discussion of the AWA bargaining regime see R.C. McCallum, 'Australian Workplace Agreements - An analysis' (1997) 10 *Australian Journal of Labour Law* 50; A. Stewart, 'The Legal Framework for Individual Employment Agreements in Australia' in S. Deery and R. Mitchell, (eds.) *Employment Relations: Individualisation and Union Exclusion* (Federation Press: Annandale, 1999), 18.

⁵⁹ WRA s 170VQ.

“important to appreciate that awards still play a crucial role in the federal industrial relations system, and in the broader society”.⁶⁰

The processes of conciliation and arbitration under the WRA are set out in Part VI, “Dispute Prevention and Settlement”. They are designed to ensure that wages and conditions are protected by enforceable awards acting as a safety net of “fair minimum wages and conditions of employment”.⁶¹ The function of the AIRC is twofold: to establish a minimum level of wages and conditions for Australian workers, while ensuring that the objects of the WRA in setting terms and conditions of employment by agreement at the workplace or enterprise level are achieved.⁶²

The AIRC has a pared back award making function whereby awards only act as a floor of minimum standards and conditions. Section 89 directs the AIRC to prevent and settle industrial disputes so far as possible by conciliation, and by arbitration, “as a last resort and within the limits specified within the Act”. Where matters proceed to arbitration, the scope of the award allowable under the Act is limited to 20 defined matters.⁶³ Where parties wish to have matters regulated outside the scope of those 20 matters, they must reach a bargained agreement.

Protected Industrial Action

The right to strike in the WRA exists in the right to take protected industrial action in support of bargaining for a certified agreement or an AWA. As noted by the court in *National Workforce Pty Ltd v Australian Manufacturing Workers Union*,⁶⁴ the protected action regime is the sole federal repository of a right to strike and the only currently enforceable source of the right.

The protected industrial action provisions allow parties negotiating certified agreements or AWAs to undertake industrial action free from the threat of legal liability under the common law, federal or state legislation, and from the threat of

⁶⁰ Creighton and Stewart, *supra* note 11 at 122.

⁶¹ WRA ss 88A (a) and (b).

⁶² WRA s 88A.

⁶³ WRA s 89A.

dismissal or victimisation on the basis of that action. There are two types of protected industrial action, the first relating to the negotiation of Division 2 or Division 3 enterprise agreements and the second, the negotiation of Australian Workplace Agreements.

Protected Action for Division 2 and Division 3 Certified Agreements

Protected industrial action with respect to Division 2 and Division 3 agreements is regulated under Division 8 of Part VIB of the WRA, “Negotiations for certified agreements etc”.⁶⁵

Scope of Protected Action

Where appropriate steps have been taken to initiate a bargaining period, a negotiating party (organization of employees, a member of an employee organization employed by the relevant employer, an officer or employee of the employee organization or an employee who is a negotiating party) is entitled to organise or engage in industrial action directly against the employer.⁶⁶ The industrial action must be undertaken for the purposes of supporting or advancing claims made in respect of the proposed certified agreement or in response to a lockout by the employer.⁶⁷ An employer is also entitled during a bargaining period to lockout all or any of the employees whose employment will be subject to the agreement for the purposes of supporting or advancing claims made by the employer in respect of the proposed certified agreement or in response to industrial action undertaken by the relevant employees.⁶⁸

Where parties apply to the AIRC for certification, the agreement reached must be about matters pertaining to the relationship between an employer and relevant employees.⁶⁹ Equally, any protected industrial action undertaken in support of

⁶⁴ [1998] 3 VR 265 per Phillips, Charles and Batt JJ.A at 275 – 276. See the discussion of this case in chapter 5.

⁶⁵ For general discussion of these provisions see Creighton and Stewart, *supra* note 11 at 155 – 167; G. McCarry, ‘Industrial Action Under the Workplace Relations Act’ (1997) 10 *Australian Journal of Labour Law* 137.

⁶⁶ WRA s 170ML(2).

⁶⁷ *Ibid.*

⁶⁸ WRA s 170ML(3). Section 170ML(4) defines “lockout” for the purposes of this section as the employer preventing employees from performing work under their contracts of employment without terminating those contracts. Section 170ML(6) provides that an employer is only entitled to lockout employees where the continuity of their employment is not affected by the lockout.

⁶⁹ WRA s 170MI(1).

negotiations for the agreement must be in support of claims that may be encompassed by the resulting certified agreement.⁷⁰ The inclusion of claims incapable of certification in an agreement will result in a retrospective loss of protection to parties who have engaged in industrial action, irrespective of whether or not they believed that the agreement was capable of certification or not:

An honest and reasonable, but mistaken, belief that a proposed agreement satisfies the requirements of s 170LI is a mistake as to the operation of the Act. If a person takes industrial action in respect of such a proposed agreement, it does not assist the person who makes the mistake that he or she believed that the proposed agreement was one which fell within the meaning of Division 2 of Part VIB and was capable of being certified under Division 4 of Part VIB. The Act does not refer to a 'purported' proposed agreement; nor does it refer to an 'honest and reasonable, but mistaken belief' that a proposed agreement under Division 2 is capable of certification under Division 4. On the contrary, the nature of the proposed agreement is expressed as an element of the protection conferred by s 170ML.⁷¹

In this context, the courts have had cause to consider whether claims made by employee organizations relating to employment entitlements and associated matters such as compulsory bargaining fees are matters pertaining to the relationship between employers and employees. If not, any agreements reached including such claims are not capable of certification and industrial action undertaken is not protected.

Employee Entitlements

As a result of a number of high profile corporate collapses in Australia, the trade union movement advocates the establishment of trust funds into which employee entitlements can be paid, as and when they fall due, to insulate employees against corporate insolvency.⁷² In *Transfield Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (Transfield)*,⁷³ the AFMEPKIU included a claim in negotiations for a certified agreement for employee entitlements to be paid to the Manusafe trust fund established by the Australian Metal Workers

⁷⁰ *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40, 2 September, 2004, unreported judgment.

⁷¹ *Ibid* per McHugh J at para 120.

⁷² For discussion of the high profile corporate collapses and subsequent attention to the issue of employee entitlements see R. Campo, 'The Protection of Employee Entitlements in the Event of Employer Insolvency: Australian Initiatives in the Light of International Models' (2000) 13 *Australian Journal of Labour Law* 236; D. Noakes, 'Corporate Groups and the Duties of Directors: Protecting the Employee or the Insolvent Employer?' (2001) 29 *Australian Business Law Review* 124.

⁷³ AIRC, Print PR908287, 30 August, 2001, per Munro J.

Union. Munro J held that the claims for payment to Manusafe did not pertain to the relationship between employers and employees due to the discretionary nature of the trustees' obligation to make payouts under the trust. Therefore, any industrial action undertaken by the AFMEPKIU was not protected action.⁷⁴

The matter was revisited again in *Electrolux Products v Australian Workers Union*,⁷⁵ after the AMWU had addressed the problems with the Manusafe trust deed identified in *Transfield*, by removing the trustee discretion. Merkel J agreed that the new proposed term in the certified agreement did pertain to the relationship between employers and employees.⁷⁶

Union Bargaining Fees

A union bargaining fee is a fee imposed upon non-union employees for the services of the union in negotiating a universally applicable certified agreement. In an effort to combat falling trade union density, employee organizations sought to include these terms in their ambit of claims for the purposes of bargaining a certified agreement. In the *Electrolux* case the ambit of claims included a compulsory bargaining fee of \$500 to be paid to the Australian Workers Union for all new employees employed after the certification of the agreement.⁷⁷

At first instance, Merkel J held that the clause did not pertain to the relationship between employer and employees. Merkel J then considered whether or not the industrial action lost protected status due to the inclusion of an uncertifiable matter.

⁷⁴ The *Transfield* decision came before the Federal Court in *Transfield Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2001] FCA 1533, unreported judgment, 31 October 2001 per Moore J. The AFMEPKIU had amended the terms of their claims, removed the discretion in the trust deed and sought to undertake protected industrial action in support of the revised claims. Transfield sought an injunction on the basis that the action was in breach of Munro's original s 127 order. Moore J held that the claims were sufficiently altered that there was no breach of the original order.

⁷⁵ [2001] FCA 1600, unreported judgment, 14 November, 2001 per Merkel J.

⁷⁶ *Ibid*, para 34. Merkel J stated at para 34: "[i]n my view, the substance of the employee entitlement claim, the central and critical aspects of it, and its subject matter, relate to payments by the employers, as such, for the benefit of employees, as such. The payments relate to particular aspects of the remuneration to be received by employees for service to their employer ... and belong to, and are within the sphere of, the relationship between Electrolux and its employees, as such": For further discussion of the case law as at 2002 see J. Cantanzariti and Y. Shariff, 'Major Tribunal Decisions in 2001' (2002) 44 *Journal of Industrial Relations* 211 at 212 – 216.

⁷⁷ *Electrolux Decision*, *supra* note 75. For further discussion see L. A. H. Johns, 'To Certify or Not to Certify - That Is (Still) the Question' (2003) 16 *Australian Journal of Labour Law* 108.

Merkel J held that the bargaining fee clause was a discrete, significant and substantive matter, significant enough that the relevant action lost protected status. It was unlikely that the legislature “intended that protected action was able to be taken to advance or support claims in respect of a substantive, discrete, and significant matter that does not pertain to the requisite relationship, or that an agreement about such a matter is to be capable of certification”.⁷⁸

The union appealed the decision to the Full Court of the Federal Court, where the decision was overturned on the issue of bargaining fees.⁷⁹ The court, rather than focusing on the proposed terms of any consequential certified agreement, considered s 170ML(2)(e), that the claims made during a bargaining period must be “genuinely made in respect of the proposed agreement”.

With respect to s 170ML(2)(e), the court stated that the only essential, for the purposes of the section, were that the claims be genuinely made in respect of the proposed agreement:

[p]rovided the claims are genuinely made, it does not matter that others may think them unrealistic. In the industrial relations arena, as in other spheres of life, extravagant claims are often made. Mostly, an extravagant claim is unsuccessful; but sometimes it is conceded, perhaps in a modified form.⁸⁰

Accordingly, the court held that the purpose of the industrial action in the case fell within the terms of s 170ML(2)(e). Further, the action would not be denied protected status because of the possibility that the insertion of a bargaining fee clause could cause difficulty at the point of certification under s 170LI(1).⁸¹

The decision of the Full Court of the Federal Court was overturned on appeal to the High Court in *Electrolux Home Products Pty Ltd v Australian Workers' Union (Electrolux)*.⁸² The High Court held (Kirby J in dissent) that a claim for a bargaining fee does not pertain to the relationship between employer and employee, that an

⁷⁸ Ibid, para 52.

⁷⁹ *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors v Electrolux Home Products Pty Ltd and Ors* [2002] FCAFC 199, 118 FCR 177, per Wilcox, Branson and Marshall JJ.

⁸⁰ *Electrolux Full Federal Court*, supra note 79 at 194, para 91.

⁸¹ Ibid at 195, para 90.

⁸² *Electrolux Home Products*, High Court, supra note 70.

agreement containing such a provision cannot be certified and that industrial action undertaken in support of a matter that does not pertain to the relationship between employer and employee cannot be protected action. Further, the Coalition Government has procured an amendment of the legislation in order to prevent the certification of agreements containing bargaining fees clauses, designating such clauses to be 'objectionable'.⁸³

The political and legal debate over union bargaining fees was less about the legal dimensions of protected action, and more concerned with the role of trade unions in bargaining.⁸⁴ The High Court in *Electrolux* affirmed that the bargaining model does not encompass demands made by parties outside the context of certified agreements and parties may not undertake protected action in support of such demands. The implications of limiting protected action to claims that may be certified in a certified agreement and of allowing the loss of protection to occur irrespective of the motivations of the parties was explored by Kirby J in a dissenting opinion:

[t]o expose an industrial organization of employees to grave, even crippling, civil liability for industrial action ... is to introduce a serious chilling effect into the negotiation that such organizations can undertake on behalf of their members. It would be a chilling effect inimical to the process of collective bargaining, including by such organizations on behalf of their members as contemplated by the Act.⁸⁵

⁸³ After two unsuccessful attempts in 2001 and 2002 (*Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2001* (Cth); *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002* (Cth)) the Coalition Government passed the *Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Act 2003* (Cth). The Act inserts new provisions preventing employee organizations from demanding the payment of a bargaining fee from another person or undertaking industrial action with the intention of obtaining agreement to the payment of a bargaining fee. The AIRC is directed to refuse to certify agreements containing objectionable provisions – s 170LU(2A).

⁸⁴ J. Cantanzariti, Y. Shariff and S. Brown, 'Major Tribunal Decisions in 2002' (2003) 45 *Journal of Industrial Relations* 166 at 179 note that "[t]he debate surrounding union bargaining fees is not so much a technical legal argument over statutory interpretation as it is a political struggle waged by various unions in a desperate bid to keep themselves from the fringes of Australian industrial relations, and ultimately, from industrial oblivion". This may overstate the matter, but is demonstrative of the political and ideological aspects of the bargaining fees debate.

⁸⁵ *Electrolux Home Products*, High Court, *supra* note 70, per Kirby J at para 192. In the aftermath of the High Court decision in *Electrolux*, concern has been raised over the legitimacy of a range of terms included in agreements certified by the AIRC. At the time of writing, the implications of *Electrolux* have been considered by the AIRC in *K. L. Ballantyne and National Union of Workers*, AIRC, PR 952656, 22 October, 2004, per Ross VP where the AIRC was called upon to determine the validity of a number of clauses in an existing certified agreement.

Rights versus Interests Disputes

The WRA scheme of protected industrial action utilises a rights/interests distinction whereby protected action is available for disputes of interests but not of rights.⁸⁶

Section 170MN provides that protected industrial action cannot be undertaken by an employer, employee or employee organization during the currency of a certified agreement, or during the currency of an award created under s 170MX(3).⁸⁷ Such action will only be permitted after the nominal expiry date of the relevant certified agreement or s 170MX(3) award has passed. Contravention of s 170MN is not an offence, but it is a contravention to which a penalty (fine) attaches.⁸⁸

It remains unclear whether or not the prohibition on industrial action during the currency of a certified agreement extends to industrial action in pursuit of interests established within the existing agreement. This matter was considered by the Federal Court in *Emwest Products Pty Ltd v AFMEP&KIU*.⁸⁹ During the course of negotiations with Emwest for a certified agreement in 2000, AFMEP&KIU raised the issue of redundancies within their claims. However, the parties were unable to reach agreement and it was decided to leave redundancy out of the final agreement, to be revisited in 2001. The 2000 agreement was certified in April 2001, had a nominal expiry date of June 30 2003 and contained a no extra claims clause. In July 2001 the union notified the employer that they wished to enter into a new agreement concerning redundancy and purported to take protected industrial action in support of their claim.

Emwest commenced proceedings in the Federal Court, obtaining an interlocutory injunction under s 127 of the WRA ordering that the industrial action cease.⁹⁰ At the hearing for final injunctive relief, the question in issue was whether or not the

⁸⁶ For discussion of rights versus interests dispute resolution in Australia and New Zealand see M. Vranken, 'Demise of the Australasian Model of Labour Law in the 1990's' (1994) 16 *Comparative Labour Law Journal* 1 at 13 – 16. For discussion of the rights versus interests debate generally see C. Provis, 'Rights Disputes v Interests Disputes: A Distinction for Australia?' (1993) 6 *Australian Journal of Labour Law* 205.

⁸⁷ Awards made under s 170MX(3) relate to the termination of a bargaining period. For discussion of s 170MX(3) awards see below at 189.

⁸⁸ WRA s 170ND(b).

⁸⁹ *Emwest Products Pty Ltd*, supra note 42.

⁹⁰ *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2001] FCA 1334.

prohibition in s 170MN extended to the industrial action undertaken by the union. Emwest argued that s 170MN extends to industrial action taken for the purpose of advancing any claim relating to the employment of any employee covered by the certified agreement. In response, the union argued that s 170MN only extends to industrial action taken for the purposes of advancing claims in respect of those matters agreed within the scope of the certified agreement.

The matter was heard by Kenny J who noted that s 170MN(1) is a limited prohibition, “not extending to industrial action taken for a non-prescribed purpose, even where there is a relevant certified agreement”.⁹¹ Consequently, the section will only be breached where the industrial action in question has a prescribed purpose, such purpose being that of “supporting or advancing claims against the employer in respect of the employment of employees whose employment is subject to the agreement”.⁹²

With respect to the no extra claims clause, Kenny J noted that parties were free to exclude the possibility of further claims by including a no extra claims clause in their agreements. However the clause in this case did not prevent the union from engaging in protected industrial action because the parties had contemplated further negotiations concerning redundancy when the clause was drafted, and it had to be read subject to those intentions.⁹³

The decision in *Emwest* suggests that s 170MN only applies to industrial action over existing rights contained within a certified agreement. However, subsequent decisions have suggested that *Emwest* may be confined to its own facts. In *National Fleet Network v AFMEP&KIU (National Fleet Network)*,⁹⁴ Munro J distinguished *Emwest* on the grounds that the parties in the case had a pre-existing certified agreement which was incorporated into the existing agreement and the matter at issue was covered by the old agreement.⁹⁵ In *Integrated Metal Services*,⁹⁶ Williams SDP noted that:

⁹¹ Ibid at 397.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ (2002) 115 IR 222.

⁹⁵ Ibid at 239.

[t]he decision in *Emwest* ... is one that is based upon its own particular facts. It is not, in my view, authority for any general proposition that s170MN(1) of the Act does not apply to industrial action taken for the purpose of supporting or advancing claims relating to terms and conditions of employment not dealt with in an extant certified agreement.⁹⁷

However, in the case, Williams SDP was not called upon to determine whether or not the industrial action was outside the scope of the certified agreement as a prior certified agreement had been incorporated in the same manner as in *National Fleet Network* and covered the additional claims.⁹⁸

The Bargaining Period

The protected action provisions require parties to initiate a 'bargaining period' in order to engage in protected industrial action. The AIRC must not arbitrate the relevant industrial dispute during the bargaining period.⁹⁹ A bargaining period may be initiated by an employer, an organization of employees or an employee acting on his or her own behalf, and on behalf of other employees, who want to negotiate a Division 2 or Division 3 agreement in relation to a single business or part of a single business.¹⁰⁰ To initiate a bargaining period, the initiating party is required to give written notice to the other negotiating parties, and the AIRC, of their intention to enter into a Division 2 or 3 agreement.¹⁰¹ The bargaining period will commence at the end

⁹⁶ *Integrated Metal Services Pty Ltd*, s 127(2) application to stop or prevent industrial action, AIRC, PR934714, 14 July 2003 per Senior Deputy President Williams.

⁹⁷ *Ibid* at para 9.

⁹⁸ The Coalition Government has attempted to pass legislation that would impact upon the decision in *Emwest*. The *Workplace Relations Amendment (Improved Remedies for Protected Action) Bill 2002* (Cth) Schedule One, s 1, WRA s 127 aimed to include a new subsection 127(3D) which would direct the AIRC to consider, when making an order under s 127, whether a person or organization engaging in the industrial action is a person whose employment is subject to, or is an organization that is bound by, a certified agreement that has not yet reached its nominal expiry date, and the undesirability of the occurrence of industrial action that is not protected action. However, the Bill passed through the Senate in a substantially amended form, excluding the proposed subsection 3D. The final version of the Act was limited to the insertion of a provision allowing the AIRC to make an interim order under s 127: *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004*.

⁹⁹ WRA s 170N(1).

¹⁰⁰ WRA s 170MI(1).

¹⁰¹ "Negotiating Party" is defined under WRA s 170MI(3) as:

- (a) the initiating party;
- (b) if the initiating party is an employer who intends to try to make an agreement under section 170LJ or 170LL or Division 3 – the organization or organizations who are proposed to be bound by the agreement;
- (c) if the initiating party is an employer who intends to try to make an agreement under section 170LK – the employees at the time whose employment will be subject to the agreement;
- (d) if the initiating party is an organization of employees – the employer who is proposed to be bound by the agreement;

of seven days after the day on which the notice was given or if the notice was given to different persons on different days – the later or latest of those days.¹⁰²

Protected Action during a Bargaining Period

Once the bargaining period has come into effect, the negotiating parties may undertake protected industrial action. Immunity is conferred under s 170MT against s 127 orders, against any law (whether written or unwritten) in force in a State or Territory, and against dismissal or discrimination from having engaged in the action.¹⁰³ However, immunity does not extend to industrial action that has involved, or is likely to involve, personal injury; or wilful or reckless destruction of, or damage to, property or the unlawful taking, keeping or use of property; or defamation.¹⁰⁴

Industrial action will lose protected status unless an application is made to the AIRC to certify the terms of an agreement within 21 days of the day on which an agreement was made.¹⁰⁵

Notice

Where a negotiating party intends to undertake protected action they must give three working days notice of that intention to the other negotiating parties.¹⁰⁶ However, if action occurs in response to industrial action by the other negotiating party, then all that is required is notice of the intention to take action.¹⁰⁷

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- (e) if the initiating party is an employee acting on his or her own behalf of other employees – the employer who is proposed to be bound by the agreement and the employees whose employment will be subject to the agreement.

¹⁰² WRA s 170ML.

¹⁰³ WRA ss 170MU(1) and (2). Section 170MU(3) sets out a reverse onus of proof where an employee alleges that an employer has contravened subsection (1) by providing that in proceedings under s 170NF for an alleged contravention of subsection (1), it is to be presumed, unless the employer proves otherwise, that the alleged conduct of the employer was carried out wholly or partly because the employee was proposing to engage, was engaging, or had engaged, in protected action.

¹⁰⁴ WRA ss 170MT(2) and (3).

¹⁰⁵ WRA s 170MS.

¹⁰⁶ WRA ss 170MO(3)-(5). Commenting on the content required in such a notice, the Full Court of the Federal Court in *Davids Distribution* supra note 37 per Wilcox and Cooper JJ at 495 stated in obiter dicta “[w]e think s 170MO(5) was designed to ensure that industrial disputants who are to become affected by protected action, in relation to which their usual legal rights are significantly diminished, are at least able to take appropriate defensive action ... It will be apparent we think it necessary, and sufficient, for parties to describe the intended action in ordinary industrial English it follows that a notice that refers only to ‘bans and rolling stoppages’ without any indication of the nature of the bans or the location of the rolling stoppages, does not adequately disclose the nature of the intended action”.

¹⁰⁷ WRA s 170MO(2).

Notice of intention to undertake industrial action may be given before the commencement of the bargaining period so that industrial action and the bargaining period could start on the same day. However, s 170MP provides that industrial action undertaken by a negotiating party will not be protected unless the relevant party has genuinely tried to reach agreement with the other negotiating party and has complied with any relevant AIRC order, before undertaking action. Parties who engage in protected action on the first day of a bargaining period run the risk of losing protected status if it is subsequently held that they have not genuinely tried to reach agreement with the other party, or if they have not complied with relevant AIRC orders.

Secret Ballots

There is no requirement in the protected action scheme for holding a secret strike ballot. However the AIRC may intervene in proposed protected action by ordering a secret strike ballot of the members of an employee organization or of employees engaged in negotiations for a Division 2 or 3 agreement.¹⁰⁸ Section 135 empowers the AIRC to order a secret ballot if it considers that a ballot could prevent industrial action or resolve matters in dispute.

Where the AIRC has ordered a secret ballot, any industrial action taken will not be protected action unless the ballot occurs and the industrial action is approved by a majority of valid votes cast in the ballot.¹⁰⁹ If the results of the ballot indicate that a majority of members who recorded a valid vote were not in favour of engaging in industrial action, then the members of the organization are not required to obey any direction or request of the organization in relation to engaging in or supporting in any way the industrial action.¹¹⁰

The Federal Government has attempted to introduce a compulsory secret ballot system to be administered to relevant employees prior to undertaking protected

¹⁰⁸ WRA s 135. Section 137 sets out the scope of directions for secret ballots that are to be administered by the AIRC. The section provides that directions given by the AIRC... shall provide for all matters relating to the ballot concerned, including the following matters:

- (a) the questions to be put to the vote;
- (b) the eligibility of persons to vote; and
- (c) the conduct of the ballot generally.

¹⁰⁹ WRA s 170MQ(1).

¹¹⁰ WRA s 140(1).

industrial action.¹¹¹ The proposed changes would mean that protected action could not proceed without AIRC authorisation. The motivation behind the proposed changes, according to a 2002 Bills Digest (discussion paper), is to “ensure that those participating in the action have decided upon the action and have not been misled by union officials”.¹¹² This is despite the fact that the provisions would apply to unionists and non-unionists alike. The discussion paper notes that the aim of Coalition policy in introducing secret ballots is to curb industrial activity, although “disputes are resulting in few days lost per employee”.¹¹³ Therefore, “the main role of the amendments will be to act as an influence for unions in particular to reassess their industrial action options, allowing a shift of negotiating power to employers”.¹¹⁴

Provisions Relating to Organizations of Employees

Where protected action is to be carried out by an employee organization, the organization must ensure that the action is duly authorised by the committee of management, the action occurs in accordance with internal organization rules and that written notice of committee authorisation is lodged with the AIRC.¹¹⁵

Suspension of the Bargaining Period

The logic of the protected action provisions dictates that the right to strike is subject to the supervision of the AIRC to ensure that the use of industrial strength can be mitigated where protected action poses a significant threat to the wider community. Section 170MW allows for suspension or termination of a bargaining period if the AIRC is satisfied that any one of a number of circumstances relating to the norms of the regulatory system, social welfare concerns or trade union matters, exists or has existed.¹¹⁶ An order in any of these circumstances may not be made except on

¹¹¹ This was proposed in the *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill* 1999 (Cth), the *Workplace Relations Legislation Amendment (Secret Ballots for Protected Action) Bill* 2000 (Cth) and the two *Workplace Relations (Secret Ballots for Protected Action) Bills* 2002 (Cth), all of which stalled in the Senate.

¹¹² *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill* 2002 [No 1], Bills Digest No. 116 2001 – 02, Prepared by Steve O’Neill, Economics, Commerce and Industrial Relations Group, Published by the Department of the Parliamentary Library, 2002 at 1.

¹¹³ *Ibid* at 7 and 20.

¹¹⁴ *Ibid* at 20.

¹¹⁵ WRA s 170MR(1). Section 170MR(4) provides that where a notice of authorisation is duly lodged, it will be presumed that the internal rules of the organization have been complied with.

¹¹⁶ WRA s 170MW(1).

application by a negotiating party unless the circumstance is one of social welfare, where the AIRC may act on its own initiative or on the basis of an application by a negotiating party or the Minister.¹¹⁷

Bargaining in Accordance with the Norms of the System

The AIRC may suspend or terminate a bargaining period where one of the negotiating parties:

- did not genuinely try to reach an agreement with the other negotiating parties before organising or taking industrial action or is not genuinely trying to reach agreement;¹¹⁸ or
- has failed to comply with any directions of the AIRC that relate to the proposed agreement or to a matter that arose during negotiations for the proposed agreement;¹¹⁹ or
- has failed to comply with a recommendation of the AIRC under s 111AA relating to the proposed agreement or a matter that arose during negotiations for the proposed agreement.¹²⁰

Where a bargaining period relates to employees employed in part of a single place of business, the AIRC may suspend or terminate the bargaining period if the initiating party is not complying with an award, order, certified agreement or direction of the AIRC in relation to another part of the single business.¹²¹

Social Welfare

The AIRC may intervene where industrial action, taken to support or advance claims in respect of the proposed agreement, is threatening to:

- endanger the life, the personal safety or health, or the welfare of the population or of part of it; or
- cause significant damage to the Australian economy or an important part of it.¹²²

¹¹⁷ WRA ss 170MW(8)(a) and (b).

¹¹⁸ WRA ss 170MW(2)(a) and (b).

¹¹⁹ WRA s 170MW(2)(c).

¹²⁰ WRA s 170MW(2)(d). Section 111AA governs AIRC recommendations made by consent where the AIRC is exercising powers of conciliation in respect to a particular matter.

¹²¹ WRA s 170MW(6).

The leading case on these provisions is *CFMEU v Coal and Allied Operations Pty Ltd*.¹²³ The CFMEU had initiated a bargaining period and had taken protected industrial action at the Coal and Allied Operations Pty Ltd Hunter Valley No 1 Mine. The CFMEU sought an order from the AIRC that the bargaining period be terminated on the grounds that the industrial action was threatening to endanger the life, personal safety and health of the people of the Newcastle and Hunter regions and that the strike was causing significant damage to the Australian economy, or the part of the Australian economy located in the Newcastle and Hunter regions.¹²⁴ At first instance, Boulton J agreed with the submissions of the unions and terminated the bargaining period. Coal and Allied Operations Pty Ltd appealed the decision to the Full Bench of the AIRC where the decision was overturned.¹²⁵ The Full Bench considered that Boulton J had erred in the exercise of his discretion by giving too much weight in his consideration to the potential escalation of the industrial dispute and potential damage that could occur, rather than the actual industrial action that was occurring at the time of the application.¹²⁶ Commenting on the application of s 170MW(3), Munro J stated that:

[s]ection 170MW(3) is a most important part of the section [170MW]. The way in which it is interpreted and applied has serious consequences for disputing parties and for the public at large. Its operation involves the resolution of the competing rights of registered organizations and employers to take industrial action against each other with impunity and of the community and the economy to be protected from serious harm arising from such action.¹²⁷

The matter was subsequently appealed to the Federal Court, which overturned the Full Bench decision.¹²⁸ The employer appealed to the High Court where the decision of the

¹²² WRA ss 170MW(3)(a) and (b).

¹²³ (1997) 77 IR 269.

¹²⁴ The CFMEU was seeking the exercise of the arbitral powers of the AIRC to settle the dispute. If the bargaining period could be terminated on the grounds set out in s 170MW(3), the AIRC could proceed to arbitrate the dispute, and make a binding award under the terms of s 170MX which would not be limited to the scope of allowable award matters under s 89A. For discussion of s 170MX awards see footnote 137 of this chapter.

¹²⁵ *Coal and Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1998) 80 IR 14 per Giudice P, Munro J, and Larkin C.

¹²⁶ *Ibid* per Munro J at 59.

¹²⁷ *Ibid* per Munro J at 51 – 52.

¹²⁸ *Construction, Forestry, Mining and Energy Union and Ors v Giudice and Ors* (1998) 159 ALR 1, per Spender, Moore and Branson JJ.

AIRC Full Bench was preferred.¹²⁹ Commenting on the exercise of the discretion under s 170MW(3), the majority noted that:

the nature of the threat to which a decision-maker must be satisfied under s 170MW(3) of the Act involves a measure of subjectivity or value judgment The presence of the words “significant” and “important” in s 170MW(3)(b) indicate that the decision-maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question.¹³⁰

An example of a successful application to suspend a bargaining period is *JSM Trading Pty Ltd v AFMEPKU*.¹³¹ The AIRC suspended a bargaining period applying to Esso Gas Plants at Longford and Long Island in Victoria for four weeks to enable the completion of key maintenance tasks at the site. Lacey SDP held that if the maintenance were not carried out, gas supplies to Victorian consumers and businesses in the middle of winter would end up being restricted, which could endanger the welfare of the part of the population that uses gas in Victoria.

Trade Union Related Matters

The AIRC may intervene to suspend or terminate a bargaining period where industrial action is being organised or taken by an organization and

- the action is undertaken in order for an employee organization to obtain industrial coverage over employees who are not members or not entitled to membership in the organization;¹³² or
- the action relates, to a significant extent, to a demarcation dispute;¹³³ or
- the action contravenes an order of the AIRC that relates, to a significant extent, to a demarcation dispute.¹³⁴

¹²⁹ *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585, per Gleeson CJ, Gaudron, Kirby, Hayne and Callinan JJ.

¹³⁰ *Ibid*, per Gleeson CJ, Gaudron and Hayne JJ, Callinan J in agreement, at 594.

¹³¹ AIRC PR 903260, 9 April, 2001 per Lacey SDP.

¹³² WRA s 170MW(4).

¹³³ WRA s 170MW(5)(a); “Demarcation Dispute” is defined in s 4 of the WRA for the purposes of the WRA as including:

- (a) a dispute arising between 2 or more organizations, or within an organization, as to the rights, status or functions of members of the organizations or organization in relation to the employment of those members; or
- (b) a dispute arising between employers and employees, or between members of different organizations, as to the demarcation of functions of employees or classes of employees; or
- (c) a dispute about the representation under this Act, or the Registration and Accountability of Organizations Schedule [Schedule 1B] of the industrial interests of employees by an organization of employees.

Effect of Suspension or Termination of Bargaining Period

Where the AIRC has suspended or terminated a bargaining period, any action undertaken by a negotiating party or any other person in respect of the proposed agreement will not be protected action while the bargaining period is suspended.¹³⁵

Where the AIRC terminates a bargaining period on social welfare grounds, the AIRC must, as soon as practicable, exercise its powers of conciliation with respect to the industrial dispute.¹³⁶ Where conciliation fails, the AIRC is directed, if it considers it appropriate and if it is satisfied that the negotiating parties have not settled the matters at issue and are not likely to settle such matters through further conciliation, to exercise its powers of arbitration to make an award dealing with the matters at issue.¹³⁷ The power of arbitration granted under this section may only be exercised by a Full Bench of the AIRC.¹³⁸

Protected Action and Secondary Boycotts

Due to the regulation of secondary boycott action under the *Trade Practices Act* 1974 (Cth), there is little regulation of secondary boycotts within the WRA.¹³⁹ However, there is specific provision against secondary boycott conduct in relation to protected action contained in s 170MM which provides that industrial action will not be protected if it is engaged in, or organised, in concert with one or more persons or organizations that are not protected persons, or if it is organised other than solely by one or more protected persons.¹⁴⁰

¹³⁴ WRA s 170MW(5)(b):

¹³⁵ WRA s 170MW(9).

¹³⁶ WRA ss 170MWX(1) and (2).

¹³⁷ WRA s 170MX(3). In such a case, the AIRC exercises its powers of arbitration to make an award under s 170MY. Section 170MY(2) provides that the power to arbitrate and make an award under s 170MY is not limited by the list of allowable award matters set out in s 89A. For an example of the application of s 170MX and the factors that affect the grant of an award, see *CFMEU v Coal and Allied Operations Pty Ltd* (1999) 93 IR 82; AIRC, PR R9753.

¹³⁸ WRA s 170MX(4).

¹³⁹ For discussion of the regulation of secondary boycotts under the TPA see below at 214.

¹⁴⁰ WRA ss 170MM(1) and (2). For the purposes of section 170MM, "protected person" is defined in subsection 3 as:

- (a) an organization or employees that is a negotiating party; or
- (b) a member of such an organization who is employed by the employer; or

In practice, the terms of s 170MM have extended beyond deliberate secondary boycott behaviour on the part of employee organizations. In *National Workforce Pty Ltd v Australian Manufacturing Workers Union*, the Australian Manufacturing Workers Union (AMWU) initiated a bargaining period and sought to engage in protected industrial action at the same time as two other unions.¹⁴¹ The other unions had failed to give appropriate notice and were held not to have initiated bargaining periods. An injunction under s 127 was granted against the AMWU because it had engaged in industrial action with non-protected persons despite the fact that it had believed that the other unions were also protected persons and had itself complied with the process.

Pattern Bargaining

Pattern bargaining involves the initiation of several bargaining periods at several connected workplaces, with simultaneous industrial action. Provided that each union follows the correct process, each incidence of industrial action will be protected, allowing unions to seek similar outcomes with respect to each work site.

In *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors (Australian Industry Group)*¹⁴² a campaign by Victorian unions called 'Campaign 2000' utilised pattern bargaining to pursue uniform industry-wide certified agreements. The Australian Industry Group applied to the AIRC for termination of the bargaining periods involved, on the grounds that the negotiating parties were not genuinely trying to reach agreement. Munro J noted that the existence of pattern bargaining in itself is not sufficient to terminate a bargaining period on the ground that the parties are not genuinely trying to reach agreement.¹⁴³ However, the existence of pattern bargaining could suggest that parties are not trying to genuinely reach agreement:

(c) an officer or employee of such an organization acting in that capacity; or an employee who is a negotiating party.

¹⁴¹ *National Workforce*, supra note 64.

¹⁴² AIRC, PR T1982, Munro J, 16 October 2000.

¹⁴³ Ibid at para 46. Munro J at para 46 also objected to the use of the word "pattern" in this context noting that, "I do not use the expression "pattern" to describe such demands. The notion of pattern demands or pattern bargaining lacks precision. It also has a partisan pejorative content." (Emphasis added).

I see no reason why such claims may not be advanced in a way that involves a genuine effort to have each employer concede the benefit sought. In such cases, the “pattern” character of the benefit demanded, its source and even the uniform content of it, may be a cogent demonstration that the negotiation conduct is genuinely directed to securing agreement from the other party. But advancement of such claims in a way that denies individual negotiating parties opportunity to concede, or modify by agreement, cannot satisfy the test established by the Act. Nor can the advancement of such claims in a way that effectively seeks agreement from or through entities that are not the negotiating party to whom industrial action or the relevant bargaining period is directed. The party initiating bargaining about such “common claims” must be genuinely trying to reach agreement.¹⁴⁴

Subsequent to the decision in *Australian Industry Group*, the *Workplace Relations Amendment (Genuine Bargaining) Act 2002* (Cth) inserted a legislative note after s 170MW(2) which directs attention to the decision in *Australian Industry Group* and the fact that parties engaged in pattern bargaining may not be genuinely trying to reach agreement. When the legislation was first introduced it contained provisions enabling the AIRC to terminate a bargaining period where it believed that a party was not genuinely trying to reach an agreement with other negotiating parties as a result of a process of pattern bargaining.¹⁴⁵ The AIRC was to be directed to consider a range of factors sourced from *Australian Industry Group*, the existence of which would tend to indicate that the first negotiating party was not genuinely trying to reach agreement with the other negotiating parties:

- one party shows an intention to reach an agreement with persons in an industry who are or could become negotiating parties to another agreement with that party; or
- one party shows an intention to reach an agreement with all persons in an industry who are, or could become, negotiating parties with that party; or
- one party shows an intention primarily to reach an agreement with a person other than the negotiating parties; or
- one party shows a refusal to consider or respond to proposals made by other negotiating parties.¹⁴⁶

¹⁴⁴ Ibid at para 49 per Munro J.

¹⁴⁵ The Parliament of the Commonwealth of Australia, House of Representatives, *Workplace Relations Amendment (Genuine Bargaining) Bill 2002* Cth, Explanatory Memorandum, page 6.

¹⁴⁶ Ibid.

However, the Government was unable to pass the legislation in the Senate and had to compromise with the mere insertion of the legislative note.

Coercion

Section 170NC provides that:

A person must not:

- (a) take or threaten to take any industrial action or other action; or
 - (b) refrain or threaten to refrain from taking any action;
- with intent to coerce another person to agree or not to agree to making, varying, terminating, or extending the nominal expiry date of, an agreement under Division 2 or Division 3.

This section does not apply to action that is protected action.¹⁴⁷ Employers must not coerce or attempt to coerce an employee of an employer with respect to making or withdrawing a request for the involvement of a union organization as the employees' representative with respect to the making of a non-union certified agreement under Division 2.¹⁴⁸ Contravention of these provisions is not an offence, but the provision is a penalty provision under the WRA and fines may attach.¹⁴⁹

It is likely that unprotected industrial action undertaken in the Federal regime is automatically a breach of the coercion provision. This effect of the section was highlighted by the High Court in *Electrolux*, where six High Court judges held that unprotected industrial action undertaken in support of claims in a proposed certified agreement constituted coercion under the section.¹⁵⁰ The finding was made irrespective of the fact that the parties believed that the action they were undertaking was protected action and the claims made were genuine. The implications of the decision in *Electrolux* are that procedural errors or the inclusion of claims unrelated to the relationship between employer and employee in the protected action process will result in lost protection and an apparently automatic breach of the coercion provisions.

¹⁴⁷ WRA s 170NC(2).

¹⁴⁸ WRA s 170NC(3).

¹⁴⁹ WRA s 170ND.

¹⁵⁰ *Electrolux Home Products*, High Court, *supra* note 70.

Protected Action for Australian Workplace Agreements

In accordance with the approach of the WRA, whereby parties may take protected industrial action in support of a proposed agreement, negotiating parties to an AWA are able to take protected industrial action.

The protected action provisions applying to negotiations for an AWA are set out in Division 8 of Part VID. Parties engaged in negotiations for an AWA need not initiate a bargaining period. Limited immunity will be conferred if the party initiating the industrial action or lockout provides the other party with three working days' notice of their intention to take such action.¹⁵¹ Where the employer or employee gives the requisite notice and engages in protected action for the purposes of negotiations for an AWA, the same degree of immunity and protection against dismissal or discrimination is conferred on the employer or employee as that conferred under the protected action provisions that apply to negotiations for a Division 2 or Division 3 agreement.¹⁵²

The inclusion of AWA protected action provisions creates a difficulty because industrial action is generally considered to be collective in nature.¹⁵³ Employers may engage in lockout behaviour in an equally effective fashion regardless of whether they are locking out one individual or many individuals. However it is questionable whether work stoppages engaged in by a single individual would have any significant effect on an employer unless that individual has a high level of personal bargaining power. Furthermore, the risk to the business of an employer in locking out a single employee, as opposed to a group of employees, is considerably reduced.¹⁵⁴

A further difficulty with the AWA protected action provisions relates to the ability of the AIRC to terminate AWA protected action. Where AWA protected action occurs, the parties are not required to initiate a bargaining period. This means that there is no AWA equivalent to the suspension or termination of a bargaining period applicable to Division 2 and 3 agreements, affecting the ability of the AIRC to intervene in

¹⁵¹ WRA s 170WD(1).

¹⁵² WRA ss 170WC and 170WE.

¹⁵³ McCarry, *supra* note 65 at 141.

¹⁵⁴ For discussion of this issue see Stewart, *supra* note 58 at 33-36.

particularly intractable disputes. In the case of *The Australasian Meat Industry Employees Union v G and K O'Connor (G and K O'Connor)*,¹⁵⁵ an application was made to the AIRC for an order under s 127 directing that an employer lockout of employees in support of AWA negotiations cease. The lockout had been in place for in excess of eight months when the order was sought and the employees concerned had little success in finding alternative employment or financial support. The difficulty for the AIRC in this case was that there was no bargaining period to be terminated. Further, as the action was AWA protected action, it appeared that an order under s 127 would not be enforceable against the employer due to the immunity granted to AWA protected action in s 170WC.¹⁵⁶ Despite the fact that the order may not be enforceable against the action undertaken by the employer, Justice Boulton made an order under s 127 directing that the lockout stop, noting that:

any uncertainty as to enforceability should not cause the Commission to refrain from making an order in this case. It is appropriate that an order be made even if only to show the Commission's judgment that the lockout and dispute have gone on for too long and that there should be renewed efforts by the parties to resolve their differences other than by industrial action.¹⁵⁷

The combination of the inability to suspend or terminate a bargaining period and the fact that s 127 orders will not be enforceable means that there is no capability within the AIRC to terminate a particularly long or protracted AWA dispute. This is of concern especially in a circumstance where individual employees are locked out of employment for a protracted period.

The AWA protected action provisions have been listed for repeal before the Federal Parliament, in the *Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill 2000 (Cth)*.¹⁵⁸ The rationale behind the proposed amendments appears to have been that in practice the provisions have been

¹⁵⁵ (1999) 97 IR 251.

¹⁵⁶ There was some dispute in *G and K O'Connor*, supra note 155 as to whether or not s 170WC conferred immunity against an AIRC order under s 127 in the same terms as the immunity granted to protected action in support of negotiations for collective certified agreements, as s 170WC does not include the specific express statement of immunity against s 127 orders found in s 170MT(1). However, Boulton J at 256 stated that "I am inclined to the view that s 170WC(1) may constitute a bar to an action in the Court to enforce an order made under s 127". Enforcement of AIRC orders and decisions is a matter for the courts.

¹⁵⁷ *G and K O'Connor*, supra note 155 at 258.

¹⁵⁸ For discussion of this Bill see S. McCrystal, 'Employee Protection or Flexibility and Efficiency?' (2001) 26 *Alternative Law Journal* 136.

insignificant and were originally introduced only to ensure AWA's appeared to be on an even playing field with enterprise agreements where "protected industrial action for trade union negotiations is a reality".¹⁵⁹ The Federal Government argues that the provisions "are not relevant to the negotiation of individual as distinct from collective agreements".¹⁶⁰

Other Provisions Relating to Industrial Action under the WRA

Strike Pay

Under both the common law and the WRA, the logic applied to strike action dictates that just as employers are deprived of the benefit of their employees' labour and experience a loss of profit, so too should employees be deprived of income during a strike. Under s 124 of the WRA, the AIRC has no power to deal with claims by employees for payment in relation to a period during which those employees were engaged in industrial action. Under Part VIIIA the payment of remuneration to employees or indirectly via employee organizations for periods during which they were on strike is unlawful. Payments are not to be made or accepted in relation to periods of industrial action under any circumstances over which the Commonwealth Parliament has legislative competence.¹⁶¹ While the making of payments in relation to periods of industrial action is not an offence under the Part, the provisions are penalty provisions to which fines attach.¹⁶²

The effect of these provisions is that parties to negotiations for a Division 2, Division 3 or AWA agreement cannot include strike pay as part of their proposed agreement. It would be a contravention of Part VIIIA for parties to agree that employees or an organization will be paid for a period of time during which they were on strike.

Where employees engage in industrial action that does not include a complete stoppage, the legislation is unclear on their entitlement to remuneration. McCarry notes that the provisions of Part VIIIA would extend to enable an employer to

¹⁵⁹ McCallum, *supra* note 58 at 56.

¹⁶⁰ Department of Employment, Workplace Relations and Small Business submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee inquiry into the *Workplace Relations Amendment (Australian Workplace Agreements Procedures) Bill* 2000 at 53.

¹⁶¹ WRA ss 187AA and 187AB.

withhold remuneration from employees who have engaged in a limited work ban or 'go slow' campaign.¹⁶³ More recent commentary suggests that it remains unclear at law as to whether or not there has to be a complete cessation of work before the prohibition against payments applies, or whether it will apply where work restrictions are limited.¹⁶⁴

Stand Down Clauses

Parties to certified agreements may include stand down clauses in a certified agreement or make an application to the AIRC for the inclusion, variation or omission of a stand down clause.¹⁶⁵ These clauses enable an employer to stand down employees without pay for reasons including the effect of industrial action by any persons on the employers' business including the employers' own employees.¹⁶⁶

¹⁶² WRA ss 187AA(3), 187AB(4) and 187AD(1).

¹⁶³ McCarry, *supra* note 65 at 150.

¹⁶⁴ *The Law Relating to Industrial Action in the Building and Construction Industry*, Discussion Paper 18, Prepared by the Faculty of Law at Monash University for the Royal Commission into the Building and Construction Industry, November 2002, at 45 (hereafter 'the Cole Royal Commission Discussion Paper'). The Discussion paper notes that during the 1998 Waterfront Dispute, the Federal Government actively encouraged the employers (Patrick Stevedores) to refrain from paying their employees for any period of industrial action, regardless of whether or not it constituted a total stoppage. This point has also made by Dabscheck: "Peter Reith [Then Federal Minister for Workplace Relations] drew Patrick's attention to Section 187AA of the [WRA], which says employers must not make payment to employees if they are involved in industrial action Patrick informed the Port Botany workforce they would not receive any pay until the overtime bans were lifted. The workers concerned maintained their bans, receiving no pay for work performed in non-overtime, or normal hours." B. Dabscheck, 'The Waterfront Dispute: Of Vendetta and the Australian Way' (1998) 9 *Economic and Labour Relations Review* 155 at 170. Ryan J considered the issue of part payments in the Federal Court in the case of *Independent Education Union of Australia v Canonical Administrators, Barkly Street, Bendigo and Others* (1998) 157 ALR 531 in a case involving selective work bans. Ryan J appeared to accept in the case that the common law rules on acceptance of part performance are preserved by para (e) of the definition of "industrial action" in s 4 of the WRA, whereby "[the] action Could only have lost its prima facie character as "industrial action" if it were shown to have been authorised or agreed to by the employer as contemplated by para (e) of the definition [of industrial action]" at 548. In this case, Ryan J did not accept that the partial performance involved in the case had been authorised or agreed to by the employer and therefore, the employees were not entitled to payment for the periods of industrial action. An additional complication is that the Coalition Government has demonstrated the desire to ensure that employees are not entitled to be paid for any work done on any day that industrial action is undertaken: the *Workplace Relations Amendment (More Jobs, Better Pay) Bill* (Cth) 1999 proposed to insert provisions to prevent payment for any day on which any form of industrial action occurred.

¹⁶⁵ WRA s 170MD(6).

¹⁶⁶ WRA s 126.

Section 127 Orders

A section 127 order is an order of the AIRC directing that industrial action cease or not occur.

Section 127 Orders and Bans Clauses

Section 127 orders are a legislative descendent of bans clauses, which were award clauses that prohibited industrial action by parties bound by the award.¹⁶⁷ Bans clauses were widely utilised during the 1960s, but after a concerted industrial campaign of non-participation and non-payment of fines and the jailing of a prominent union official, the clauses fell into disuse.¹⁶⁸ There are no modern WRA provisions enabling the insertion of a bans clause.¹⁶⁹ With respect to the WRA and s 127, the AIRC has stated that the jurisprudence developed governing the insertion and enforcement of bans clauses does not continue to apply to s 127:

[a]n order under s 127 may be accurately described as a legislative descendant of the bans clause. We accept that there are some points of the principles applied in relation to bans clauses that may be similar to those applicable to the exercise of the discretion under s 127 ... [But] it is appropriate for the discretion under s 127 to be exercised in a fully contemporary context without inhibitions based on precepts formulated for purposes and objectives that may have no counterpart in the current Act.¹⁷⁰

¹⁶⁷ *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors* (1997) 73 IR 311 per Munro J, Harrison SDP and Leary C at 329, para 2.5.6.

¹⁶⁸ For discussion of the use (and consequent disuse) of bans clauses see L. Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Law Book Company: Sydney, 1994), chapter 2; J. Kerr, 'Recalling the Northern Territory Cattle Station Industrial Award Case of 1965 and the O'Shea Case of 1969' in *Arbitration in Contempt* (HR Nicholls Society: Melbourne, 1986), 174; L. W. Maher, 'The Bans Clause and Federal Strike Law - The End of an Era?' [1975] *Business Law Review* 22; M. Pittard, 'The Conciliation and Arbitration Act: The Prevention of Strikes and the Recovery of Wages' (Paper presented at the Australian Conciliation and Arbitration After 75 Years: The Federal Arbitration Process Conference, Present Problems and Future Trends, Monash University, Faculty of Law, 14th of July 1979); Pittard and Naughton, *supra* note 11 at 1192 – 1197.

¹⁶⁹ The argument is made by both Creighton and McCarry that the absence of an express bans clause provision in the WRA does not exclude the possibility that there remains a residual jurisdiction in the AIRC to insert bans clauses into awards: B. Creighton, 'Section 127 of the Workplace Relations Act and the Regulation of Industrial Conflict' in R. Naughton, (ed.) *The Workplace Relations Act in Operation: Eight Case Studies* (Centre for Employment and Labour Relations Law, Occasional Monograph Series No 7, University of Melbourne: Parkville, 1998), 49 at 52; McCarry, *supra* note 65 at 142.

¹⁷⁰ *Coal and Allied*, *supra* note 167 at 329.

Elements of an Order Under s 127

Section 127 of the WRA allows the AIRC to make orders to stop or prevent industrial action. The section provides that:

if it appears to the AIRC that industrial action is threatened, impending or probable, in relation to:

- (a) an industrial dispute; or
 - (b) the negotiation or proposed negotiation of an agreement under Division 2 of Part VIB; or
 - (c) work that is regulated by an award or certified agreement;
- the AIRC may, by order, give directions that the industrial action stop or not occur.

The AIRC is directed by the Act to hear and determine an application under s 127 as quickly as practicable.¹⁷¹ An order under s 127 will not apply to picketing as picketing is not encompassed by the definition of industrial action in s 4.¹⁷²

The scope of the discretion

Section 127 orders require an exercise of discretion on the part of the AIRC:

This discretion is apparently at large ... Accordingly, the identification of considerations relevant to the exercise of any such discretion should be guided by the objects of the Act and an understanding of the relationship of the power and the effect of its exercise to the scheme of the Act.¹⁷³

The leading case with respect to s 127 orders is the decision of the AIRC Full Bench in *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors.*¹⁷⁴ In considering an application for an order under s 127, the Full Bench identified three types of industrial action relevant to the exercise of the discretion under s 127, namely *prohibited* action, *protected* action and *unprotected* action.

¹⁷¹ WRA s 127(3).

¹⁷² *Davids Distribution*, supra note 37.

¹⁷³ *Coal and Allied*, supra note 167 at 316 – 316, para 2.2.

¹⁷⁴ *Coal and Allied*, supra note 167. For discussion of the decision in *Coal and Allied* see V. Di Felice, 'Stopping or Preventing Industrial Action in Australia' (2000) 12 *Melbourne University Law Review* 310; A. Forsyth, 'A New Handbrake on Industrial Action or Not? A Note on Cases Relating to s 127 of the Workplace Relations Act 1996 Cth' (1998) 11 *Australian Journal of Labour Law* 152.

Prohibited Industrial Action

Prohibited industrial action is action prohibited under the WRA, for example engaging in boycott conduct or undertaking industrial action before the nominal expiry date of a certified agreement.¹⁷⁵ AIRC decisions suggest that a s 127 order in respect of prohibited industrial action would not be automatic, but would most likely result.¹⁷⁶

Protected Industrial Action

There is no guidance in the terms of s 127 as to whether orders can be made where industrial action is protected action. Section 170MT(1) states that s 127 orders have no effect against protected action. In *Coal and Allied*, the Full Bench stated that where industrial action is protected action, the AIRC must take into account that any resultant order will have no effect on protected action, but may still make an order.¹⁷⁷

Unprotected Industrial Action

Unprotected industrial action is action that is not specifically prohibited under the WRA, but is not protected action. A wide range of industrial action may fall within the boundaries of unprotected action, however a s 127 order will not be automatically available:

The scheme of the Act does not in our view clearly imprint the discretion granted by s 127 with any guiding requirement to the effect that any industrial action that is not protected action should be directed to cease. The norms of the system reflected in the Act are not so specific that all unprotected industrial action must be taken to be of itself unjustifiable [t]here is nothing in the Second Reading Speech or in the provisions of the Act from which it should be inferred that unprotected action is per se to be treated as illegitimate to a degree that warrants it automatically being subject to direction.¹⁷⁸

¹⁷⁵ *Coal and Allied*, supra note 167 at page 322, para 2.5.4.

¹⁷⁶ See *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v AG Coombs Fire Protection* (1998) 87 IR 110 and Di Felice, supra note 174 at 315.

¹⁷⁷ *Coal and Allied*, supra note 167 at 330 – 332, para 2.5.7.

¹⁷⁸ Ibid at 324 and 329, paras 2.5.4 and 2.5.6. At 323, para 2.5.4 the Full Bench stated that “[c]learly, a relatively wide range of industrial action may fall outside the class of protected action. Thus, any industrial action that is for a purpose extraneous to supporting claims made in respect of the proposed agreement would appear not to be protected action. Action taken against more than one employer, or in concert with organizations not negotiating parties in a bargaining period, or in concert with fellow members of an organization who are not also fellow employees, or for economic or social campaigns, or to secure union organizational objectives would each appear incapable of being protected action within the meaning of ss170ML and 170MM.” For discussion of the approach of the AIRC and the role

Decisions of the AIRC and Federal Court subsequent to *Coal and Allied* have developed principles guiding exercise of the discretion under s 127 in cases of unprotected industrial action. Di Felice surveyed these cases and extracted a set of relevant factors to be considered in the exercise of discretion:¹⁷⁹

- the purpose of the industrial action – is the action directed at advancing claims related to a proposed agreement, or to industrial factors or some other cause?
- the economic impact of the industrial action on the employer concerned, although this will not be a significant factor in its own right;
- the public interest;
- the history of industrial action by the respondent party;
- the conduct of the parties to the dispute; and
- freedom of expression.¹⁸⁰

The Federal Government has sought to limit the scope of the discretion under s 127. The *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill* 2002 (Cth) directed the AIRC to hear s 127 applications within 48 hours and set out provisions for the AIRC to make ‘interim’ orders where the AIRC was satisfied that the industrial action was not protected action (or had not formed a view on that matter). The Bill proposed a list of factors for the AIRC to take into account in the granting of an interim order including potential damage to any industry, escalation of the action, pattern bargaining and WRA notice requirements.¹⁸¹ Further, the Bill directed the AIRC to have regard to the undesirability of the occurrence of

of s 127 with respect to economic or social campaigns see N. Luxton, ‘Section 127 and Protest Action: The ‘Scrap the Lap’ Campaign Case’ in R. Naughton, (ed.) *The Workplace Relations Act in Operation: Eight Case Studies* (Centre for Employment and Labour Relations Law, Occasional Monograph Series No 7, University of Melbourne: Parkville, 1998), 55.

¹⁷⁹ Di Felice, *supra* note 174.

¹⁸⁰ Di Felice, *supra* note 174 at 326 notes that the issue of freedom of expression was raised in *Communications Electrical Energy Information Postal Plumbing and Allied Services Union of Australia v Commissioner Liang of the Australian Industrial Relations Commission and Another* (1998) 86 IR 142 which involved industrial action protesting against proposed changes to Western Australian industrial legislation. In the Federal Court, at 158, French J stated: “the effect of a particular order on freedom of action and specifically on freedom of expression is a matter relevant to and properly to be taken into account in the exercise of the discretion”.

¹⁸¹ *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill* 2002 (Cth), Schedule 1, s 1.

unprotected industrial action.¹⁸² When the Bill was passed into law in 2004, all substantial provisions had been removed, except the ability of the AIRC to make an interim order under s 127.¹⁸³

Enforcement of s 127 orders

The Federal Court, on the application of a person or organization affected by a s 127 order, may grant an injunction to stop contravention of the order if it is satisfied that the order has been contravened or is likely to be contravened.¹⁸⁴ The granting of an injunction by the Federal Court is not a matter of right; rather the Federal Court retains discretion and, in exercising injunctive powers, will apply the equitable principles pertaining to injunctive relief.¹⁸⁵ Failure to comply with an injunction of the Federal Court constitutes contempt of court and may form the basis for a range of penalties, including the cancellation of the registration of any organization involved in the contempt.

Section 127 Orders and Employer Conduct

As the definition of industrial action under the WRA encompasses lockouts, s 127 orders can be made by the AIRC against an employer engaging in a lockout. In *G and K O'Connor* the union involved brought an action against an employer who had locked out employees for in excess of 8 months in pursuit of negotiations in support

¹⁸² Ibid. In the Second Reading Speech for the Bill, Minister for Employment and Workplace Relations Abbot stated “[s]trikes cost jobs. Protected action is a privilege, statutorily conferred once certain requirements have been fulfilled. When an industrial organization refuses or fails to comply with those requirements and unprotected industrial action results, then that organization must be quickly called to account. Industrial parties are not exempt from acceptable standards of behaviour and should not be able to avoid the rule of law. This Bill will ensure that applications for orders to prevent unprotected industrial action are dealt with quickly and that, in dealing with applications, the Australian Industrial Relations Commission takes into account the undesirability of unprotected action.” Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 26 June 2002, Second Reading Speech, *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Bill 2002* (Cth), Mr Abbott, Minister For Employment and Workplace Relations at 4379.

¹⁸³ *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act 2004* (Cth).

¹⁸⁴ WRA s 127(6).

¹⁸⁵ *Australian Paper Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Ors* (1998) 81 IR 15 per North J at 16–17: “The power to grant an injunction is a discretionary power in very wide terms ... The Court only acquired jurisdiction if the Commission has made an order, but the mere fact that the Commission has made an order does not mean that the court is bound to, or will grant, an injunction. The grant of an injunction is an independent function performed by the Court By conferring a power on the Court expressed in terms of a power to grant an injunction, Parliament intended that the Court would be guided by the principles established by equity for the grant of an injunction”.

of proposed AWAs.¹⁸⁶ In view of the length of the lockout, and the degree of hardship experienced by the employees involved, Boulton J made an order under s 127, noting that the order did not represent “a conclusion about the respective merits of the positions adopted by the parties in the negotiations or the dispute”.¹⁸⁷

Employee organizations have also sought to utilise s 127 against other forms of employer behaviour, particularly termination of employment contrary to the terms of a certified agreement.¹⁸⁸ Employee organizations have argued that termination of employment in these circumstances constitutes industrial action susceptible to an order under s 127, because it is action within the definition of industrial action under the WRA, in the form of a permanent ban, limitation or restriction on the performance of work.¹⁸⁹ This argument was rejected by a Full Bench of the AIRC in *AFMEP&KIU v The Age Company Limited* (the *Age Company Limited*),¹⁹⁰ where the employer concerned sought to enforce compulsory redundancies in breach of an express term of a certified agreement. The AIRC distinguished between termination of employment and a ban, limitation or restriction on work that would not affect the continuation of the employment relationship. Such action would more easily come within the definition of industrial action.¹⁹¹

In the *Age Company Limited* the AIRC refused to make a determination on a submission made by the Commonwealth Government that the only employer action that would come within the definition of industrial action for the purposes of s 127 would be a lockout. Instead, they left the question open to be decided in future cases on the facts of those cases. This suggests that while the decision excludes termination of employment from the definition of industrial action, other employer action short of lockout may be susceptible to an order under s 127.

¹⁸⁶ *G and K O'Connor*, supra note 155.

¹⁸⁷ *Ibid* per Boulton J at 258.

¹⁸⁸ For example see *Australian Flight Engineers' Association v Qantas Airways Limited*, AIRC, PR Q4688, 7 August 1998, per Whelan C; *Australian Federation of Air Pilots v Kendall Airlines (Aust) Pty Ltd*, AIRC, PR 920361, 23 July 2002, per Watson SDP.

¹⁸⁹ WRA definition of industrial action, s 4(b).

¹⁹⁰ AIRC, PR 946290, 11 May 2004, Per Guidice J, Harrison SDP and Simmonds C.

¹⁹¹ *Ibid* at paras 33 – 35.

Section 166A – Delay of Tortious Action

Section 166A of the WRA operates to delay the commencement of tortious proceedings in connection with unprotected industrial action. The section provides that an action in tort under the law of a State or Territory may not be brought by a person “against an organization of employees, or an officer, member or employee of such an organization, in relation to conduct which is in contemplation or furtherance of claims that are the subject of an industrial dispute”, unless a relevant certificate has been obtained from the AIRC.

Where a party wishes to commence tortious action they must notify the AIRC who will then conciliate the dispute.¹⁹² Such conciliation may continue until one of three things occurs. First, if the AIRC forms the opinion that it is not likely to be able to stop the conduct complained of promptly, it must immediately certify in writing to that effect.¹⁹³ Second, if the AIRC determines that it would cause substantial injustice to the applicant if they were prevented from bringing tortious action during conciliation, then the AIRC must immediately certify in writing to that effect.¹⁹⁴ Third, if the AIRC has not stopped the conduct complained of by the applicant at the end of 72 hours after the notice of intention was submitted to the AIRC, then the AIRC must immediately certify in writing to that effect.¹⁹⁵

The process for the delay of commencing tortious action for unprotected industrial action does not apply with respect to:

- conduct that has resulted in personal injury; or wilful or reckless destruction of, or damage to, property; or the unlawful taking, keeping or use of property; or
- conduct arising out of a demarcation dispute; or
- conduct arising out of a dispute over a claim for payment in respect of a period during which the employees were engaged or are engaging in industrial action; or
- conduct that is in breach of a direction given by the AIRC or a State industrial authority.¹⁹⁶

¹⁹² WRA s 166A(3) and (5).

¹⁹³ WRA s 166A(6)(a).

¹⁹⁴ WRA s 166A(6)(b).

¹⁹⁵ WRA s 166A(6)(c).

¹⁹⁶ WRA s 166A(2).

Section 166A does not clearly address whether or not an applicant would be able to commence tortious action if the industrial action complained of ceases within 72 hours and a certificate is not issued. In *The Age Company Limited*, the Full Bench of the AIRC held that cessation of the industrial action complained of within the 72-hour period does not prevent the AIRC from issuing a certificate to enable tortious action to commence. The AIRC could issue a certificate in these circumstances if the industrial dispute was still continuing, if the applicant would suffer substantial injustice if a certificate were not issued, or if the dispute continues and the hours involved eventually add up to 72.¹⁹⁷ The Full Bench found that such a construction of the section is consistent with restricting the ability to bring an action in tort unless the certification requirements are met.¹⁹⁸ The decision indicates that if none of the three certification criteria are fulfilled, the applicant will not be entitled to a certificate from the AIRC, and will be unable to commence tortious proceedings.

One outstanding s 166A issue relates to the characterisation of applications for injunctions against threatened or actual tortious conduct. An action brought in court for an injunction to stop or prevent strike action on the basis of an actual or threatened tort is an action brought in equity. However, the wording of the section states that in order to bring an action in **tort**, a certificate must be obtained. If this construction of s 166A is correct, then the section only operates as a limited immunity against tortious proceedings, which are less efficacious in terms of limiting the immediate effects of strike action, and not against applications for injunctions, which have a more potent immediate impact. In an application by Patrick Stevedores for an injunction against tortious behaviour by the Maritime Union of Australia, Beach J stated that:

[an] application for injunctive relief is not an action in tort under the law of the State of Victoria. It is an application seeking that the court exercise its equitable jurisdiction to prevent the union and certain of its officials committing the tort of intentionally interfering with the performance by members of the union of their contracts with Patricks. If Patricks had issued a writ seeking no more than injunctive relief, I would have no hesitation in concluding that the court had jurisdiction to entertain the present application.¹⁹⁹

¹⁹⁷ Ibid at paras 93 – 114.

¹⁹⁸ Ibid at para 115.

¹⁹⁹ *Patrick Stevedore No 1 Pty Ltd and Anor v Maritime Union of Australia* (1998) 79 IR 268 per Beach J at 271 – 272.

This reflects the approach taken in a number of decided cases.²⁰⁰ Creighton and Stewart argue that this construction is at odds with the purpose of s 166A, the scheme of the WRA, and “takes only limited account of the fusion of law and equity and sits uneasily with relevant High Court authority”.²⁰¹

Cancellation and Suspension of Awards and Orders

Section 187 enables a Full Bench or the President of the AIRC to cancel or suspend all or any of the terms of an AIRC award or order upon application by an organization, a person interested or the Minister, on the grounds that an organization has contravened the WRA, contravened the Registration and Accountability of Organizations schedule to the WRA, or an AIRC award or order. An application may also be made where a substantial number of the members of an organization refuse to accept employment in accordance with existing awards or for any other reason.²⁰² The power to cancel or suspend an award is used sparingly as it denies affected employees the benefit of minimum safety net entitlements.²⁰³

Deregistration of Organizations

Deregistration entails loss of the right to participate in the bargaining system at the federal level and loss of access to the processes of conciliation and arbitration. While deregistration operates as a sanctioning device, it also entails a loss of regulatory control over the organization concerned.²⁰⁴ The relevant provisions are set out in WRA Schedule 1B, Chapter Two, Part Three, s 28 and allow an organization, person

²⁰⁰ See *Ansett Australia Ltd v Flight Attendants Association of Australia*, (1996), VSC No. E7635, unreported judgement, 31 October, 1996 per Hampel J; *Tenix Defence Systems Pty Ltd v The AFMEP&KI Union and Ors* [1999] VSC 40, unreported judgment, 19 February 1999, per Beach J.

²⁰¹ Creighton and Stewart, *supra* note 11 at 414. The reference to High Court authority refers to the decision of the High Court in *General Motors Holden v Difazio* (1979) 141 CLR 659 at 688 where Mason J, commenting on the word ‘action’ in a provision of the then *Industrial Conciliation and Arbitration Act 1972* (SA) which acted as a limitation on actions in the common law courts, stated that “[t]he expression ‘cause of action’ frequently signifies an antecedent right asserted by a plaintiff. However, in the context of a general provision dealing with limitations of actions and applicable to ‘all actions’ ... it should be given the wider meaning ‘cause of complaint’”.

²⁰² WRA ss 187(4)(b) and (c).

²⁰³ *Cole Royal Commission Discussion Paper*, *supra* note 164 at 51. The Commission paper notes a rare example where an award was cancelled as a punitive measure – *Application by East-West Airlines (Operations) Ltd and Ors; Re Cancellation of Pilots Award*, AIRC, PR H9340, Full Bench, 19 August, 1989. At 52, the discussion paper notes that when cancelling the award, the Full Bench “cautioned that taking action under the award cancellation provisions was a grave step because of the potential consequences for the parties such as dramatic changes to employment contracts, and therefore such a step must only be taken after careful consideration and inquiry”.

interested, or the Minister to make an application to the Federal Court for an order cancelling the registration of an organization on any one of the following grounds:

- where the conduct of an organization or a substantial number of the members of an organization has prevented or hindered the achievement of an object of this Schedule (relating to employee organizations) or the WRA;²⁰⁵ or
- where the organization, or a substantial number of the members of the organization or of a section or class of members of the organization has engaged in industrial action that has prevented, hindered or interfered with Constitutional trade and commerce or the provision of any public service by the Commonwealth or a State or Territory or authority of same;²⁰⁶ or
- where the organization, or a substantial number of the members of the organization or of a section or class of members of the organization has or have been engaged in industrial action that has had, is having or is likely to have a substantial adverse effect on the safety, health or welfare of the community or a part of the community;²⁰⁷ or
- where the organization, or a substantial number of the members of the organization or of a section or class of members of the organization, has or have failed to comply with an injunction granted under subsection 127(6) or (7) of the WRA directing compliance with an AIRC order that industrial action not occur or stop;²⁰⁸ or
- where the organization, or a substantial number of the members of the organization or of a section or class of members of the organization, has or have failed to comply with an injunction granted under section 187AD of the WRA directing compliance with an AIRC order relating to payment for periods of industrial action.²⁰⁹

If the court finds that a ground for cancellation has been established and does not consider deregistration to be unjust, having regard to the degree of gravity of the matters constituting the ground on which the cancellation would be based, the court is

²⁰⁴ Creighton and Stewart, *supra* note 11 at 390, note that deregistration operates as a “double edged sword”.

²⁰⁵ WRA Schedule 1B, Chapter 2, Part 3, s 28(1)(a).

²⁰⁶ WRA Schedule 1B, Chapter 2, Part 3, s 28(1)(b).

²⁰⁷ WRA Schedule 1B, Chapter 2, Part 3, s 28(1)(c).

²⁰⁸ WRA Schedule 1B, Chapter 2, Part 3, s 28(1)(d).

²⁰⁹ WRA Schedule 1B, Chapter 2, Part 3, s 28(1)(e).

directed to cancel the registration of the organization.²¹⁰ An alternative to cancellation is s 29 of the Schedule, which enables the court to suspend any of the rights, privileges or capacities of the organization or its members, give directions as to the exercise of any suspended rights or privileges, or restrict the use of the funds or property of the organization.²¹¹ If an alternative order is made, deregistration is deferred until the orders cease to be in force or until an application by a party to the proceeding is made and the court considers it just to determine the question of deregistration.²¹²

The Right to Strike and WRA Freedom of Association Provisions

The Federal labour laws have always contained provisions designed to protect the right of an employee to join a trade union and not face victimisation on the basis of that choice.²¹³ In practice, such provisions were quasi criminal in nature, with a correspondingly onerous burden of proof.²¹⁴ The right to belong was dominant. Where the right not to belong was considered, it was usually addressed through the inclusion of conscientious objection provisions.²¹⁵

The WROLAA introduced Part XA of the WRA, titled *Freedom of Association*. The Part was designed to implement the right of all employees and employers to choose whether or not to join an industrial organization and face no adverse consequences as a result of that choice. Part XA is relevant to the right to strike as issues surrounding the right to belong or not to belong are often connected to industrial action.

²¹⁰ WRA Schedule 1B, Chapter 2, Part 3, s 28(3). The wording of the section is that the Court **must** cancel the registration of the organization subject to subsection (4) and s 29 of the Schedule.

²¹¹ WRA Schedule 1B, Chapter 2, Part 3, s 29(2)(c).

²¹² WRA Schedule 1B, Chapter 2, Part 3, s 29(3).

²¹³ R. McCallum, 'A Priority of Rights: Freedom of Association and the Waterfront Dispute' (1998) 24 *Australian Bulletin of Labour* 207 at 210; For detailed discussion of the history of the protection of union membership in Australian law see P. Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism* (Federation Press: Sydney, 1995) at chapter 5, 150 – 172.

²¹⁴ McCallum, *supra* note 213 at 210.

²¹⁵ For discussion of conscientious objection to union membership in Australian law and protections available to non-employees and self-employed persons see Weeks, *supra* note 213, chapter 6.

The Operation of Part XA

The principal enactment of freedom of association is contained within Division 3 of Part XA, preventing discriminatory behaviour by parties to employment related matters. Under s 298K(1) an employer must not do any of the following for a prohibited reason, or for reasons that include a prohibited reason,

- (a) dismiss an employee;
- (b) injure an employee in his or her employment;
- (c) alter the position of an employee to the employee's prejudice;
- (d) refuse to employ another person;
- (e) discriminate against another person in the terms or conditions on which the employer offers to employ the other person.²¹⁶

Section 298L(1) sets out the prohibited reasons that effect a breach of s 298K(1). Four of these relate to industrial action, providing that conduct will be for a prohibited reason if it is carried out because the employee, independent contractor or other person concerned:

- (d) has refused or failed to join in industrial action; or
-
- (f) has made, proposed to make or has at any time proposed to make an application to an industrial body for an order under an industrial law for the holding of a secret ballot; or
- (g) has participated in, proposed to participate in or has at any time proposed to participate in a secret ballot ordered by an industrial body under an industrial law; or
-
- (l) in the case of an employee or independent contractor, who is a member of an industrial association that is seeking better industrial conditions – is dissatisfied with his or her conditions.

There are also provisions in Part XA designed to stop employees, independent contractors or industrial associations from discriminating against each other, an employer or any other person including discrimination involving industrial action. Section 298N provides that an employee or independent contractor must not cease work in response to an employers' enforcement of industrial rights or membership of an industrial association. Section 298P prohibits industrial action taken against an employer in order to force that employer to join or resign from an organization or encourage or incite the employer to demote or terminate the employment of an

²¹⁶ Section 298K(2) repeats these provisions with respect to independent contractors and 'persons' who have entered into a contract for the services of an independent contractor.

employee (or any other prejudicial conduct) on any prohibited ground (ie - their membership, non-membership or actions in relation to an industrial association). Industrial action undertaken with this purpose would not be protected action under the WRA.

Sections 298Q and 298S prohibit conduct by an industrial association against an employee or an independent contractor where that action is designed to prejudice that person in their employment or possible employment with the intention of coercing the person to join in industrial action or dissuading or preventing the person from making an application for the holding of a secret ballot.

Finally, the provisions impact upon the internal security devices of industrial associations. An industrial association must not impose a penalty, forfeiture or disability upon a member or officer of that industrial association:

- with the intent to coerce the member to join in industrial action; or
- because the member has refused or failed to join in industrial action; or
- because the member has or has proposed to make an application to an industrial body for the holding of a secret ballot; or
- because the member has participated in, proposes to participate in or has at any time proposed to participate in a secret ballot ordered by an industrial body under an industrial law.²¹⁷

Reverse Onus

The freedom of association provisions operate under a reverse onus, set out in s 298V, whereby if it is alleged that the conduct in question was, or is, being carried out for a particular reason or with a particular intent, and that to carry out the conduct for that reason and that intent would constitute a contravention of the Part, then the presumption arises that the conduct was or is being carried out for that reason or that intent. The operation of the reverse onus in practice was considered by the Federal Court in *Davids Distribution*.²¹⁸ The majority noted that where an application for interlocutory injunctive relief is made alleging a breach of s 298K, the applicant for

²¹⁷ WRA s 298R.

²¹⁸ *Davids Distribution*, supra note 37.

injunctive relief must establish that there is a serious question to be tried that the conduct complained of was encompassed by s 298K and occurred for a prohibited reason. This will raise the rebuttable presumption under s 298V.²¹⁹

Remedies

Division 6 sets out the remedies for a contravention of Part XA. Contravention does not constitute an offence, but substantial fines and a range of other orders may be made upon application by a party with standing under Division 6.²²⁰

WRA Construction of Freedom of Association

A central theme explored in chapter 1 and chapter 3 was the ILO construction of freedom of association in a functional manner wherein the right to strike operates as a facet of freedom of association. The enactment of freedom of association within Part XA does not conform to the ILO model and is not designed to operate in a functional manner. Rather, it is static, enacted along the competing interpretative tradition of an individualist freedom of association, encompassing only the right to belong or not to belong. The objects of the Part, to ensure that employers, employees and independent contractors are free to join or not to join and not to be victimised as a result of their choice, support this restricted construction of freedom of association.²²¹ The objects do not purport to protect the activities of an organization once a member's right to belong or not belong is assured and, indeed, in providing protection for union dissenters (who, for example, decline to join in industrial action) undermine democratic decisions of the collective.

²¹⁹ Ibid.

²²⁰ WRA s 298X.

²²¹ WRA s 298A.

However, despite this lack of provision for collective activity in the literal text of Part XA, judicial interpretations have placed a broader construction on the provisions, extending their role beyond the individualist interpretation. In *Davids Distribution*, Wilcox and Cooper JJ note that Part XA must be read within the context of the Act as a whole:

[I]n the context of the Act, Part XA does not stand alone. It is aimed at ensuring that employees may band together, if they wish, for collective bargaining of the type provided in the Act to achieve the broader objectives of the Act as contained in section 3.²²²

Wilcox and Cooper JJ compare the provisions in Part XA to US provisions designed to ensure “the right to participate in protection [sic] union activities, including the taking of collective industrial action against an employer to seek to obtain better industrial conditions”.²²³ They argue in favour of a whole of Act approach, with a broader approach to freedom of association than a literal construction of Part XA would suggest.

Another example is *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd*.²²⁴ The case involved a branch manager of the ANZ, Ms Buckland, who was also prominent in the Finance Sector Union (FSU). During a dispute between the FSU and the ANZ, Ms Buckland participated in protected industrial action. She was instructed by senior management to attend a ‘formal counselling session’ where it was suggested that she had failed in her duties as a manager by failing to persuade her employees that ANZ had taken a valid position in industrial negotiations. The ASU brought proceedings in the Federal Court alleging that Ms Buckland had been prejudiced in her employment for the prohibited reason that she was an officer or member of an industrial organization, and was dissatisfied with her terms and conditions of employment. The ASU also alleged that she had been prejudiced by reason of having taken part in protected industrial action.²²⁵ Wilcox J was satisfied that the ‘formal counselling’ was action that had the effect of

²²² *Davids Distribution*, supra note 37, per Wilcox and Cooper JJ at 500.

²²³ *Ibid*. Their honours refer to the *National Labor Relations Act*, 29 USCA ss 152(3), 157, 158(a)(1) and (3), 163.

²²⁴ (2002) 114 IR 352.

²²⁵ WRA s 170MU.

making Ms Buckland's job less secure and that this action had been undertaken for the prohibited reasons outlined.

A complicating factor was Ms Buckland's managerial position. Wilcox J found that the senior manager responsible for the formal counselling session:

thought it was her duty to ensure (or at least urge) the attendance of her staff [at work, ie: not to participate in the protected industrial action, and] must have thought she had a duty to work herself, whatever her legal right not to do so. And he must have thought it a betrayal for her, not only to fail to urge the staff to work, but to give a lead in the opposite direction by stopping work herself.²²⁶

In determining an appropriate penalty for ANZ, Wilcox J noted that it is important, for the purposes of freedom of association, that employees be able to participate in industrial activities and voice their concerns in a media context.²²⁷

The right of freedom of association has always been protected under Commonwealth industrial law. As Ms Howell says [counsel in the case], the freedom to join and actively participate in industrial activities is frustrated "if employees are not free to articulate their dissatisfaction with respect to work related matters, both as between themselves and through media".²²⁸

The case suggests that the freedom of association provisions interact with protected action to ensure that all employees have the right to engage in industrial activities. Furthermore, the decision of Wilcox J affirms that Part XA does not merely protect the right to belong, but encompasses the activities of the collective once formed and the freedom to actively participate in industrial activities.

When viewed in this manner, Part XA provides an extension of the protections established under the protected action provisions. The WRA establishes a framework for collective bargaining in which the right to participate in industrial action operates as a fundamental element. In order to establish and maintain employment terms and conditions, employees have a right to join industrial organizations, a right to participate in collective action and a right to be protected in that participation by the freedom of association provisions. This demonstrates a willingness on the part of the

²²⁶ *Finance Sector Union v ANZ*, supra note 224, at para 146 per Wilcox J.

²²⁷ *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* [2002] FCA 1035, unreported judgment, Federal Court, per Wilcox J.

²²⁸ *Ibid* at para 13.

judiciary to engage with freedom of association from a functional perspective despite the literal text of Part XA.

Freedom of Association and Unprotected Industrial Action

Where an employee engages in protected industrial action, they will be protected against dismissal, victimisation or discrimination by the protected action provisions of the WRA. Where employees and employee organizations engage in unprotected industrial action, the issue arises as to whether those employees may be dismissed, victimised or discriminated against as a result of participation.

This question arose in *Davids Distribution* after the court held that peaceful picketing was not industrial action under the WRA and therefore could not be covered by the protected action provisions.²²⁹ Fifty-two employees who had participated in the peaceful picket were dismissed. The Court had to consider whether the dismissal occurred for the prohibited reason that the employees were members of an industrial association and were dissatisfied with their conditions of employment. In determining whether or not to grant an injunction, Wilcox and Cooper JJ held that there was a serious question to be tried in the case as to “whether the dismissal of the employees for engaging in the collective industrial action ... was conduct falling within ss 298K(2) and 298L(1)(l) of the Act” despite the fact that the action was unprotected.²³⁰

The issue of unprotected industrial action was also addressed in the case *Australian Workers Union v Johnson Matthey (Aust) Ltd (Johnson Matthey)*.²³¹ Johnson Matthey dismissed two employees on the basis that they were intending to undertake unprotected action. The Australian Workers Union argued that the termination was in contravention of the freedom of association provisions on the grounds that the employees were members of an industrial association and had intended to engage in industrial action. The employer argued that the intended industrial action was not protected. In obiter dicta, Marshall J noted that:

²²⁹ *Davids Distribution*, supra note 37.

²³⁰ Ibid per Wilcox and Cooper JJ at 501.

²³¹ [2000] 171 ALR 410.

[w]here it is alleged that a breach of s 170MU(1) of the Act has occurred by reference to an employee's proposal to engage in protected action, it does not matter that the proposed protected action when later engaged in did not, in fact, become protected action because a non-protected person happened to join in the action.²³²

Dauids Distribution and *Johnson Matthey* suggest that Part XA may be used where an employee is discriminated against, victimised or dismissed as a result of engaging in unprotected industrial action. However, this use of the provisions has not yet been fully explored.

Secondary Boycotts

Unprotected industrial action remains vulnerable to common law and statutory penalties. One of those potential sources of illegality arises from the prohibition on secondary boycotts contained within Part IV of the *Trade Practices Act 1975* (Cth) (TPA). The purposes of the TPA, stated in s 2, are to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. The secondary boycott provisions are contained in Part IV of the TPA, which aims to encourage competition by prohibiting conduct that would be 'anti-competitive' in effect; thereby substantially lessening competition in a market or markets.

A typical secondary boycott would involve an industrial dispute between A, an employer and the employees of that employer, B. Other persons, C, who are not employees of A, refuse to handle goods or provide/use services which are supplied by or to be supplied to A. Therefore the actual boycott will affect third parties, D, who supply or are supplied goods or services by A through the actions of C.²³³

²³² Ibid per Marshall J at 418. The statement was obiter dicta because the subsequent industrial action was held to be protected action by the court and therefore it was not called upon to determine the application of Part XA to unprotected industrial action.

²³³ Pittard and Naughton describe a principal characteristic of a secondary boycott as action "often taken by one group of workers in support of claims not on their own behalf but in support of claims of workers employed by another employer and the action is directed to a customer or supplier of that other employer": Pittard and Naughton, *supra* note 11 at 1067.

The first legislative provisions governing secondary boycotts in Australia were introduced in July 1977 as a result of the recommendations of the parliamentary *Trade Practices Act Review Committee* (the 'Swanson Committee Report').²³⁴ Section 45D was inserted into the TPA in 1977.²³⁵ Sections 45D(A-C) were amended in 1978 extending liability to actions "hindering overseas or interstate trade or commerce".²³⁶ In 1980 the legislature inserted s 45E prohibiting "boycott agreements".²³⁷

In 1994, the Keating Government moved those boycott provisions of 'industrial application' from the TPA to the *Industrial Relations Act 1988* (Cth), creating a new Division 7 of Part VI.²³⁸ The key provisions of the IR Act as amended were s 162 and s 163 proscribing secondary boycotts of an industrial nature and s 162A which exempted peaceful picketing from the effect of the legislation. The legislation also channelled litigation through the AIRC and the short lived Industrial Relations Court of Australia.

In 1996, the WROLAA repealed the secondary boycott provisions and restored them to the TPA.²³⁹ The structure of the restored provisions is different to the old TPA

²³⁴ *Report of the Trade Practices Act Review Committee*, (Australian Government Publishing Service: Canberra, 1976) (the 'Swanson Committee Report').

²³⁵ *Trade Practices Amendment Act 1977* (Cth).

²³⁶ *Trade Practices Amendment Act 1978* (Cth).

²³⁷ *Trade Practices (Boycotts) Amendment Act 1980* (Cth). The introduction of s 45E followed the decision in *Leon Laidley Pty Ltd v Transport Workers Union and Ors* (1980) 28 ALR 129, where an agreement reached between a trade union (the Transport Workers' Union) and a fuel supplier (Amoco) to discontinue supply of petrol to a third party (Laidley), was held not to constitute a secondary boycott as the dominant purpose under which Amoco had acted was held to be to reduce industrial action at its own sites and not to damage the business of Laidley. Section 45E sought to outlaw such agreements, that exploit the requirement of s 45D that the dominant purpose of the conduct be to damage the business of the third party. For discussion of the Laidley decision, see: D. Shavin, 'Restrictive Trade Practices' (1980) 8 *Australian Business Law Review* 211.

²³⁸ *Industrial Relations Reform Act 1993* (Cth), s 43. The provisions of the TPA were reviewed by the Senate Standing Committee on Employment Education and Training, prior to the introduction of the Reform Act and the findings were published as: *The Operation of Sections 45D and 45E of the Trade Practices Act 1974*. For discussion of this Report see J. Palmos, 'Sections 45D and 45E Reviewed' (1994) 7 *Australian Journal of Labour Law* 102. For discussion of the changes made by the Reform Act to the substantive secondary boycott provisions see D. B. Moore, 'Industrial Action and Secondary Boycotts' (1994) 22 *Australian Business Law Review* 370.

²³⁹ *Workplace Relations and Other Legislation Amendment Act 1996* (Cth), s 3 and Schedule 17.

provisions, but the effect is substantially the same, meaning that pre-1993 decisions are relevant to the operation and interpretation of the 1996 legislation.²⁴⁰

The Modern Legislative Provisions

The main provisions concerning boycotts are s 45D and associated sections. They are not industrial in nature or designed specifically to apply to the industrial context but the most common application of the sections is to industrial disputes.

Section 45D(1) outlaws secondary boycotts engaged in for the purpose of causing substantial loss or damage. The section provides that:

a person must not, in concert with a second person, engage in conduct:

(a) that hinders or prevents:

- (i) a third person supplying goods or services to a fourth person (which is a corporation and which is not an employer of the first person or the second person); or
- (ii) a third person acquiring goods or services from a fourth person (which is a corporation and which is not an employer of the first person or the second person); and

(b) that is engaged in for the purpose, and would have or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.²⁴¹

The section will also apply in a circumstance where the fourth person is not a corporation but the third person is a corporation and the conduct would have or be likely to have the effect of causing substantial loss or damage to the business of the third person.²⁴²

In an industrial context, s 45D would operate to outlaw the following circumstance: Z is a trade union in dispute with an employer, D. In order to place pressure on D, Z approaches another trade union, A, and requests that they use their membership in order to disrupt the flow of goods and services to D. A approaches their members, B, employed by C. C has a number of supply contracts with D. A and B act in concert in

²⁴⁰ R. McClelland, 'Sections 45D and 45E of the Trade Practices Act 1974: Reborn or Misconceived?' (1997) 16 *Australian Bar Review* 118 at 118.

²⁴¹ TPA s 45D(2) provides that a person is taken to engage in conduct for a purpose mentioned in sub section (1) if the person engages in the conduct for purposes that include that purpose.

²⁴² The necessity for corporate involvement exists because the constitutional validity of s 45D rests principally on the corporations power.

order to hinder or prevent C supplying goods or services to D. In this case, D must be a corporation, and neither A nor B must be employees of D. If D is not a corporation, the requirements will be met if C is a corporation and the effect of the action taken by A and B would be to cause substantial loss or damage to the business of C.

One of the more contentious elements of s 45D is the meaning of 'purpose' under the section and whether parties who transgress the provisions in the pursuit of employment or industrial outcomes have the relevant 'purpose' of inflicting loss or damage on the target of the action. Purposes in this sense could be considered to encompass either the immediate purpose of the action, to place pressure on a target party through the infliction of loss or damage, or an ultimate purpose of achieving an industrial outcome. Cases decided before 1993 indicated that parties could transgress s 45D if their immediate purpose was to inflict loss or damage even if this purpose was part of a wider industrial agenda.²⁴³

When the boycott provisions were moved to the IR Act in 1993, the word 'ultimate' was placed before the word purpose in order to accommodate the concept that the ultimate purpose of a boycott may not be to inflict damage but to achieve industrial outcomes.²⁴⁴ However, when the provisions were transferred back to the TPA, any requirement of dominant or ultimate purpose was removed and the pre-1993 approach to purpose prevails. The concept of 'industrial outcomes' is now only retained within the defence to actions under s 45D contained in s 45DD.²⁴⁵

The boycott provisions under the TPA extend liability from secondary boycotts to primary boycotts in certain circumstances. Under s 45DB, a person must not, in concert with another person, engage in conduct for the purpose, and having or likely to have the effect, of preventing or substantially hindering a third person (who is not an employer of the first person) from engaging in trade or commerce involving the movement of goods between Australia and places outside Australia. While, on the face of it, the section would appear to prevent a primary boycott taking place

²⁴³ See *Devenish and Others v Jewel Food Stores Pty Ltd* (1991) 99 ALR 275 per Brennan, Dawson and Toohey JJ; *J Corp Pty Ltd v Australian Builders and Labourers Federation (WA Branch)* (1992) 111 ALR 502 where French J summarises the law related to 'purpose' at 536-537.

²⁴⁴ *Industrial Relations Act* 1988 (Cth) (as amended) s 162(1).

involving an employee of the third person and a non-employee participant (ie a trade union official), the section would not prevent such a boycott due to the operation of the defence provisions under s 45DD(1), which would provide a defence to an employee of the third person, if the boycott behaviour related to the employment terms and conditions of that person. Therefore, the section prevents boycott behaviour only where neither the first or second parties are employees of the third party.

An example of a breach of s 45DB occurred in *Australian Competition and Consumer Commission v Maritime Union of Australia and Ors*²⁴⁶ where the Maritime Union of Australia (MUA) and four union officers admitted breaches of s 45DB. The MUA, in concert with MUA officers (non employees of the relevant employers) prevented cleaning operations taking place on various ships involved in international trade. This case involved a primary boycott, undertaken in an industrial context, which constituted a breach of the TPA.

Section 45DC ensures that liability for action contravening the secondary boycott provisions attaches to employee organizations where officers or members of the organization are involved. In a reversal of the position at common law, the section deems conduct engaged in by the members or officers of an employee organization to be conduct engaged in by the organization itself.²⁴⁷ The effect of this presumption is that any loss or damage suffered by a person as a result of the conduct complained of is taken for the purposes of the TPA to have been caused by the employee organization involved. This enables the applicant to access the financial resources of the organization.

An earlier version of s 45DC (s 45D(5)) was held to be unconstitutional by the High Court in 1982. The earlier version deemed an employee organization to have acted in concert with its officials or members, unless it could establish that it “took all reasonable steps to prevent the participants from engaging in that conduct”.²⁴⁸ In

²⁴⁵ See discussion of s 45DD below at 220.

²⁴⁶ (2001) 187 ALR 487.

²⁴⁷ McLelland, *supra* note 240 at 130.

²⁴⁸ TPA, as enacted in 1982, s 45D(5).

*Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd*²⁴⁹ a majority of the High Court held that the provision went beyond the scope of the corporations power under which it was enacted. The court held that the provision attached liability to an organization unless it could demonstrate not only that it had not been involved or connected with the events, but also that it had taken active steps to prevent the conduct.²⁵⁰ Mason J noted that:

[i]n substance s 45D(5) is a law which makes a trade union responsible for a boycott affecting a corporation when that boycott is imposed by members or officers of the trade union, a responsibility which the trade union can only avoid if it demonstrates it has taken the action mentioned in the subsection. As such it is a law about trade unions; to me it has a very remote connexion with corporations, a connexion so remote that the provision cannot be characterised as a law with respect to corporations of the relevant class.²⁵¹

The issue that remains unresolved is whether or not the modern version of s 45DC is validly enacted. The current section lacks the requirement that the trade union have taken all reasonable steps to prevent the conduct, however, it is still a provision which, according to Mason J: “makes a trade union responsible for a boycott affecting a corporation when that boycott is imposed by members or officers of the trade union”.²⁵² The secondary boycott provisions still rest on the corporations power and the deeming provision makes a trade union responsible for the actions of its officers or members where a breach of the TPA is concerned. The only substantive difference is the removal of the requirement for the trade union to actively suppress the behaviour involved, however this does not appear to have been the sole factor in the High Court decision. The modern deeming provision may be unconstitutional on the ground that it bears an insufficient connection to the corporations power.

Section 45DD provides a defence to an action under s 45D and related sections where the transgressing parties’ actions were motivated by employment terms and conditions of employment. Section 45DD(1) provides that a person will not contravene ss 45D(1), 45DA(1) or 45DB(1) by engaging in conduct if the dominant purpose for which the conduct is engaged in is substantially related to the

²⁴⁹ (1982) 150 CLR 169. For discussion of the judgment in this case see M. T. Corrigan, ‘*Actors and Announcers Equity Association of Australia and others v. Fontana Films Pty. Ltd.* - Case Note’ (1983) 13 *Federal Law Review* 346.

²⁵⁰ Ibid per Mason J at 210.

²⁵¹ Ibid.

remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person. The exception applies to action that would otherwise contravene the section taken by an employee against their own employer and not action taken against their employer in sympathy with the employees of another employer with whom their employer does business. Therefore, if industrial action is taken by two sets of employees in dispute with their employers, and the employers happen to do business with each other, the action will not be boycott behaviour if each set of employees is genuinely in dispute with their own individual employers. Section 45DD(2) extends this protection to employee organizations where an employee engages in boycott conduct in concert with an officer of an organization, the conduct only involves the employees and trade union officials, and the dominant purpose of the conduct is substantially related to the remuneration, conditions of employment, hours of work or working conditions of the aforementioned employees.

The defence provisions included in s 45DD are subject to a further limitation concerning the concept of 'dominant purpose'. The defence will only be operative if the dominant purpose of the conduct related to remuneration, conditions of employment, hours of work or working conditions of that person or of another person employed by an employer of that person. The provision mirrors the defence provided under the boycott provisions enacted prior to 1993, in s 45D(3). In practice the defence has been construed in a narrow manner, looking only at the purpose of the immediate action, rather than considering any longer term industrial objectives as the active dominant purpose.²⁵³ The practical use of the provision has been limited by this narrow construction of dominant purpose, however cases in the early 1990s indicated a shift in judicial attitude, recognising that a broader industrial purpose could constitute a dominant purpose for the purposes of the defence.²⁵⁴

²⁵² Ibid.

²⁵³ This is the view reflected by Smithers J in the oft cited case *Wribass v Swallow* (1979) 38 FLR 92.

²⁵⁴ For example see *GTS Freight Management Pty Ltd v Transport Workers Union* (1990) 95 ALR 195; *Australasian Meat Industry Employees' Union v Meat and Allied Trades Federation of Australia* (1991) 104 ALR 199 and discussion of these cases in R. Naughton, 'Trade Union Liability for Acts of Members - Implications for s.45D' (1991) 4 *Australian Journal of Labour Law* 151.

The final section relating to boycott behaviour is s 45E. The section prevents parties reaching an agreement concerning the provision of goods or services where that agreement would prevent or hinder the supply or acquisition of goods or services. The section applies to two forms of transactions:

- a “supply situation” - where one party (A) has been accustomed, or is under an obligation to supply goods or services to another party (B);²⁵⁵ and
- an “acquisition situation” - where one party (A) has been accustomed, or is under an obligation, to acquire goods or services from another person (B).²⁵⁶

Section 45E(2) prohibits agreements that would hinder or prevent the carriage of business in a supply situation. Where a supply situation exists:

A must not make a contract or arrangement or arrive at an understanding with an organization of employees, an officer of such an organization, or a person acting for or on behalf of such an officer or organization, if the proposed contract, arrangement or understanding contains a provision included for the purpose, or for purposes including the purpose of:

- (a) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person; or
- (b) preventing or hindering the first person from supplying or continuing to supply such goods or services to the second person, except subject to a condition:
 - (i) that is not a condition to which the supply of such goods or services by the first person to the second person has previously been subject because of a provision in a contract between those persons; and
 - (ii) that is about the persons to whom, the manner in which or the terms on which the second person may supply any goods or services.

This prohibition is repeated in s 45E(3) with respect to acquisition situations. An exception to the provisions is contained in 45E(4) where a contract, arrangement or understanding made in writing, otherwise in contravention of s 45E, was made or arrived at with the written consent of the second person.

An example of the operation of s 45E in practice occurred in the *Troubleshooters Case*.²⁵⁷ The case involved a labour hire company called ‘Troubleshooters’ who provided contracted labour to building sites. The Building Workers Industrial Union

²⁵⁵ TPA s 45E(1)(a).

²⁵⁶ TPA s 45E(1)(b).

of Australia (BWIU) sought to persuade builders to refrain from contracting with Troubleshooters for their labour supply by suggesting that there would be ongoing difficulties at building sites if they continued to contract with Troubleshooters. The Federal Court held that s 45E was breached because the builders were accustomed to acquiring labour from Troubleshooters, and the trade union officials sought to arrive at an understanding with the builders concerning the ongoing contractual arrangements between the builders and Troubleshooters. The Court held that the “clear purpose of those involved in the incidents was to terminate the supply of services by Troubleshooters to the builders and incidentally to deter the builder acquiring services in the future”.²⁵⁸

Enforcement under the TPA

Enforcement action with respect to breaches of the secondary boycott provisions must be taken in the Federal Court. The ACCC may bring an action for the contravention of ss 45D, 45DB or 45E and the court may impose a penalty of up to \$750 000 for each act or omission.²⁵⁹ Section 76(2) prevents the imposition of this penalty against an individual for contravention of the boycott provisions. An individual who has suffered loss or damage as a result of the boycott conduct may seek injunctions under s 80 and damages under s 82 by private enforcement.

Where an application under the TPA involves an application for injunctive relief the provisions of ss 80AA and 80AB must be considered. Section 80AB of the TPA allows the court to stay the operation of an injunction under s 80 where the conduct in question involves a breach of the secondary boycott provisions and there is a proceeding in either the AIRC under Division 7 of Part VI of the WRA or in a State or Territory relating to a breach of a relevant State or Territory law. This section only allows for the stay of an injunction if the Court considers that such a stay would be likely to facilitate the settlement of the dispute by conciliation and would in all the circumstances be just.²⁶⁰ If the requirements of s 80AB are not met, the court may allow the injunction to take effect under s 80AA.

²⁵⁷ The Troubleshooters Case, *supra* note 28.

²⁵⁸ *Ibid* at 768 per Wilcox, Burchett and Ryan JJ.

²⁵⁹ TPA s 76(1A).

²⁶⁰ TPA s 80AB(1)(e).

Boycott Provisions under the WRA

WRA Part VI, Division 7 provides for conciliation of boycott disputes by the AIRC. The Division applies where there is an actual, threatened, impending or probable boycott, and the dispute relates, or may relate, to work done or to be done under an award or certified agreement; or the dispute involves an organization of employees, or officer or member of such an organization.²⁶¹ The Division allows for conciliation of disputes as an alternative to injunctive relief under the TPA. However the Division does not affect the operation of the TPA.²⁶²

Commonwealth Crimes Legislation

There are two provisions in the Commonwealth *Crimes Act* 1914 that may operate to criminalise industrial action, although these provisions are rarely, if ever, used in practice.²⁶³

Section 30J provides that if at any time the Governor-General is of the opinion that there exists in Australia a serious industrial disturbance prejudicing or threatening trade or commerce with other countries or among the States, he may make a Proclamation to that effect, which Proclamation shall remain in operation until it is revoked.

While a proclamation is in effect under s 30J:

any person who takes part in or continues, or incites to, urges, aids or encourages the taking part in, or continuance of a lock out or strike:

- (a) in relation to employment in or in connexion with the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the States; or

²⁶¹ WRA s 156.

²⁶² WRA s 162.

²⁶³ The sections have not received significant practical, academic or judicial attention. For discussion of the role of Part IIA and the history of the use of the provisions, see R. Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth *Crimes Act*' (2001) 22 *Adelaide Law Review* 259.

- (b) in relation to employment in, or in connexion with, the provision of any public service by the Commonwealth or by any Department or public authority under the Commonwealth,

shall be held to be guilty of an offence under the Act and can be subjected to imprisonment for up to 12 months.²⁶⁴ There has only ever been one proclamation issued under the provision and no prosecutions were made during the proclamation.²⁶⁵

The second provision is s 30K which provides that it will be an offence where:

anyone, by violence to the person or property of another person, or by spoken or written threat or intimidation of any kind to whomsoever directed, or, without reasonable cause or excuse, by boycott or threat of boycott of person or property:

- (b) compels or induces any person employed in or in connexion with the provision of any public service by the Commonwealth or by any Department or public authority under the Commonwealth to surrender or depart from his employment;
- (c) prevents any person from offering or accepting employment in or in connexion with the provision of any public service by the Commonwealth or by any Department or public authority under the Commonwealth;
- (d) obstructs or hinders the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the States;
- (e) compels or induces any person employed in or in connexion with the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the States to surrender or depart from his employment; or
- (f) prevents any person from offering or accepting employment in or in connexion with the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the States.²⁶⁶

The section appears to be of little practical significance in the modern workplace relations context. However, in 1993, Creighton, Ford and Mitchell noted that potential does exist for prosecutions under the provision:

[t]he fact remains ... that s 30K could be used as the basis for criminal proceedings against individuals who participate in, or help to organise, a wide range of industrial action in the Commonwealth public sector and in the transport industry. Furthermore, such proceedings may be initiated by any person.²⁶⁷

²⁶⁴ *Crimes Act 1914* (Cth), s 30J(2).

²⁶⁵ Creighton, Ford and Mitchell, *supra* note 23 at 1150.

²⁶⁶ Legislation enacted within the States also allows for the declaration of a state of emergency and consequent restrictions upon freedom of action. For discussion see: H.P. Lee, *Emergency Powers* (Law Book Co: Sydney, 1984).

²⁶⁷ *Ibid* at 1150.

Conclusion

This chapter has surveyed Australian federal law with respect to the right to strike. Beginning with the underlying position at common law, moving through the protected action regime and finally examining alternative statutory actions against industrial action, the chapter has demonstrated that the approach to regulation is at once both comprehensive and haphazard. With the notable exception of the protected action regime, the laws outlined have not been developed in a holistic approach, but as a reaction to circumstance.

The next chapter will make observations about the Australian regulatory model, identifying the existence of consistent themes and approaches within the regulation and developing propositions about the right to strike in Australian law. This will encompass the material canvassed in chapters 5 and 6. This will provide the conceptual framework against which the thesis will assess the state of compliance of Australian law with the international regime outlined in chapters 2-4.

Chapter Seven

The Nature of the Right to Strike in Australian Law

Introduction

Chapter 6 outlined the regulatory regime relating to strike action in the federal labour law system. It demonstrated that there is a complex array of provisions throughout three different Acts and a significant body of common law relevant to discussion of the right to strike in the federal labour law system. The foregoing analysis has also shown that it is not possible to consider the *Workplace Relations Act 1996* (Cth) (WRA) in isolation. In order to understand the federal regulation of the right to strike, it is necessary to appreciate the diverse factors involved and the range of regulatory mechanisms.

Drawing upon the survey of law in chapters 5 and 6, and the historical outline in the introduction, this chapter will make observations concerning the nature of the right to strike within the federal system, noting the relationship between the regulation of strikes, the bargaining model and international law. The chapter foreshadows the discussion of compliance with international law in chapter 8.

The Nature of the Right to Strike in Australian Law

The right to strike in Australian law does not operate in a vacuum. It is one part of a bargaining model that regulates the employment terms and conditions of a large proportion of the Australian working population. It is impossible to view the right to strike in isolation from this context, and the following observations orientate the right to strike within the political, historical and international context.

The Australian Bargaining Regime is Consistent with the ILO Bargaining Model

According to International Labour Organization (ILO) instruments and the quasi jurisprudence of ILO bodies, the fullest expression of the principle of freedom of association is found in the development of the necessary infrastructure and

mechanisms to facilitate and promote voluntary collective bargaining.¹ The federal labour law system is a sufficiently realised model of voluntary collective bargaining to enable meaningful measurement of Australian compliance with ILO standards on the right to strike.

Historical Context

The compulsory conciliation and arbitration model did not constitute a model of voluntary collective bargaining in which an implicit right to strike could operate as a component of the principle of freedom of association. The model was fundamentally divergent from the ILO model with respect to the requirements of voluntariness and collective bargaining. While registration within the system was voluntary (and for employees, by and large restricted to registered trade unions), participation in the system entailed compulsory submission to binding arbitration. Voluntariness for employee organizations was only genuine to the extent that registration constituted a 'choice'. Employers, once 'roped in' to a dispute by an employee organization had no choice but to submit to binding arbitration. Further, the model was not based around the precept of collective bargaining.² The majority of employment terms and conditions were established through awards with unofficial and tacitly accepted over-award bargaining occurring outside the arbitral process.³

The non-voluntary arbitral elements of the conciliation and arbitration system made measuring compliance with ILO Freedom of Association Conventions⁴ extremely difficult. The ILO model is entirely based on the negotiation of employment terms and conditions by employers, employees and employee organizations in a voluntary

¹ ILO, *Freedom of Association and Collective Bargaining, General Survey of the Reports on the Freedom of Association and the Right to Organise Convention (No. 87), 1948 and the Right to Organise and Collective Bargaining Convention (No. 98), 1949*, Report III (Part 4B), International Labour Conference, 81st Session, 1994 ('General Survey'), Chapter X, *Promotion of Collective Bargaining*, paras 235-265.

² 'Roping in' refers to the process by which a registered trade union would create a dispute with a group of employers in order to enliven the jurisdiction of the Australian Industrial Relations Commission (AIRC) and obtain an award, binding on all named employers. For discussion of the process of 'roping in' and award making see: B. Creighton and A. Stewart, *Labour Law: An Introduction* (3rd ed., Federation Press: Sydney, 2000) at 68 – 70; S. Kollmorgen, 'Genuineness in Industrial Demands' (1993) 6 *Australian Journal of Labour Law* 257.

³ For discussion of conciliation and arbitrations see the Introduction at 3-7.

⁴ ILO Convention 87, *Freedom of Association and the Right to Organize Convention* 1948 and ILO Convention 98, *Right to Organize and Collective Bargaining Convention* 1949 (the 'Freedom of Association Conventions').

setting, where the strike weapon may be utilised by employees' and their organizations as leverage. As discussed in chapter 4, the Australian compulsory conciliation and arbitration model could be used to illustrate the difficulties in measuring compliance by a non-voluntary system.⁵ The discussion demonstrated that while ILO standards are flexible, they do not easily translate when applied to models that deviate from the essential components of voluntariness and collectivity. When examining the conciliation and arbitration model in the Pilots' Dispute, the Committee on Freedom of Association (CFA) focused on the voluntary nature of registration by employee organizations to avoid the more complex issues raised by compulsion in the system. As contemporary commentary noted:

[to]provide for an internally coherent legal system which is also consistent with international Conventions [would entail] a fundamental rethinking of the law in relation to industrial relations in Australia.⁶

The discussion in chapter 4 demonstrated that the ILO model has developed from the functional collective interpretative approach to freedom of association dominant in the ILO. Meaningful compliance with ILO principles on freedom of association requires the existence of an industrial relations system comprised of freely operating actors, whereby the content and level of bargaining are self regulated. The absence of these factors within conciliation and arbitration fundamentally affected the ability of the Australian model to comply with the Freedom of Association Conventions. Any measurement of compliance beyond the superficial must have concluded that the differences in fundamentals between the systems meant that compliance could not have been meaningfully measured.

The Australian model is now orientated to voluntary collective bargaining, with only a residual role for conciliation and arbitration. The model has altered from one of centralised compulsory conciliation and arbitration, with allowance for and toleration of, over award bargaining, to a decentralised, enterprise-focused system of voluntary collective bargaining.

⁵ See discussion in chapter 4 at 125-130.

⁶ K. McEvoy and R. Owens, 'On a Wing and a Prayer: The Pilots Dispute in the International Context' (1993) 6 *Australian Journal of Labour Law* 1 at 27.

Modern Context

The two basic components of the ILO bargaining model are voluntariness and collectivity. The ability to establish compliance with the right to strike in international law requires the existence of a bargaining model containing these two central elements. Absent these components and the model becomes insufficiently similar to the ILO model to enable the meaningful measurement of compliance. Significantly, the model enacted in the federal labour law system is both voluntary and collective in nature.

Voluntariness

The federal model provides the bargaining parties with a sufficient degree of voluntariness to allow for the meaningful measurement of compliance. The elements of compulsion remaining in the system are limited to union recognition, through federal registration of employee organizations, and arbitration, to establish a safety net of minimum terms and conditions. Beyond the safety net, a settlement cannot be imposed by an external party.⁷ Further, the voluntary nature of the system is strengthened by the Part XA Freedom of Association provisions whereby voluntariness encompasses the right to belong or not to belong to an industrial association. The individual has the choice to join an industrial association and the choice to pursue voluntarily bargained outcomes either through association or not.

Collectivity

The federal labour law system operates as a model of collective bargaining. The following analysis will demonstrate the collective nature of the system through the forms of bargaining that may be utilised by parties and will address objections that may be raised to this assertion.

The main mechanism for the establishment of terms and conditions of employment under the WRA is enterprise bargaining for the creation of Division 2 and 3 certified

⁷ The exception to this proposition is the imposition of s 170MX awards after the termination of a bargaining period in exceptional circumstances by the AIRC. For discussion of s 170MX awards see chapter 6 at 189.

agreements.⁸ These agreements may be made between a union and an employer or by a group of employees and an employer. Whether a trade union is involved or not, the mechanism is collective, utilising the involvement of trade unions or spontaneous groupings of employees. This form of bargaining is the central mechanism for the regulation of terms and conditions of employment. Certified agreement making operates against a backdrop of employment regulation through the award safety net.⁹ Where terms and conditions of employment are sourced from awards, this is also collective in nature, as an award represents the arbitrated outcome of an industrial dispute between an employee organization and an employer.

A secondary form of agreement making under the WRA is individual agreement making through Australian Workplace Agreements (AWAs).¹⁰ This form of agreement making is designed to operate through individual bargaining. However, the ability to create AWAs does not detract from the assertion that the federal labour law system is collective in nature. The uptake of AWAs represents an extremely small proportion of all bargained outcomes under the federal regime.¹¹ In addition, research into the form and content of AWAs has revealed a trend of non-individualised outcomes. A study conducted by Fetter and Mitchell demonstrated that many AWAs do not operate as entire agreements. Instead they are used to effect small alterations to collectively negotiated agreements pertaining to particular individuals.¹² Further, as well as enabling individual workers to negotiate customised agreements tailored to their particular circumstances, the system facilitates the use of standardised AWAs. Employee parties to standardised agreements are nominally individualised, but are governed by identical terms and conditions to their colleagues.¹³ While standardised

⁸ For discussion of Division 2 and 3 certified agreements see chapter 6 at 170-173.

⁹ For discussion of the award safety net see chapter 6 at 173-174.

¹⁰ For discussion of Australian Workplace Agreements (AWAs) see chapter 6 at 173.

¹¹ According to the Australian Bureau of Statistics, as at May 2002 only 2.0% of the Australian Workforce had some terms and conditions of employment regulated by registered individual agreements: Australian Bureau of Statistics, *2004 Labour Statistics in Brief* (Australian Bureau of Statistics, Catalogue Number 6104.0, 2004) at 6.

¹² R. Mitchell and J. Fetter, *Human Resource Management and the Individualisation of Australian Industrial Relations* (Centre for Employment and Labour Relations Law, Working Paper No 24, Faculty of Law, University of Melbourne: Parkville, 2002) at 20-21.

¹³ For discussion of standardised AWA terms and conditions see R. McCallum, 'Australian Workplace Agreements: An Analysis' (1997) 10 *Australian Journal of Labour Law* 50; A. Stewart, 'The Legal Framework for Individual Employment Agreements in Australia' in S. Deery and R. Mitchell, (eds.) *Employment Relations: Individualisation and Union Exclusion, An International Study* (Federation

AWA's are not collectively negotiated, these outcomes illustrate the presence of collective content even in the context of individual agreement making.

In theory, it can be argued that the existence of the AWA regime may undermine the assertion that the federal labour law system is collective in nature. However, the reality of low take up rates, standardised terms and the use of AWA's for minor variations to collectively negotiated outcomes suggests that these agreements do not detract from the collective nature of the model to any significant extent. The pre-eminence of collectively negotiated certified agreements, entered into against a backdrop of the collectively managed award safety net, suggests that the federal model is predominantly collective in nature.¹⁴

Compatible models

The federal bargaining model is designed to operate on a voluntary and collective basis. Accordingly, in measuring compliance by the federal right to strike with ILO standards, the models in which the laws and standards operate are compatible and susceptible to meaningful measurement. There may be specific difficulties, particularly relating to individual agreements, free market operation and bargaining levels, however the models are compatible and there is no initial obstacle to measuring compliance.

Specific Legislative Enactment of a Right to Strike in Australia is Necessary; Any Resultant Right to Strike will be Contingent and Susceptible to Abolition

There is no entrenched right to strike in Australian law and no currently defined or accepted source of a legal obligation upon the Federal Government to provide or respect the right to strike.¹⁵ The only source of obligation is sourced from international law through ratified international instruments. However, these do not create domestically binding legislative obligations.

Press: Leichardt, 1999), 18; M. Wooden, *The Transformation of Australian Industrial Relations* (Federation Press: Sydney, 2000) at chapter 4.

¹⁴ While the federal labour law system remains predominately collective in nature, this does not mean that the concept of 'collective' bargaining is designed to include unions or that the Federal Government would not prefer a decollectivised model. For discussion of this point see A. Coulthard, 'The Decollectivisation of Australian Industrial Relations: Trade Union Exclusion under the *Workplace Relations Act*' in S. Deery and R. Mitchell, (eds.) *Employment Relations: Individualisation and Union Exclusion, An International Study* (Federation Press: Leichardt, 1999), 48.

In consequence, specific legislative enactment of a right to strike is necessary in the federal labour law system in order to meet Australia's international obligations. The common law is inherently hostile to concerted collective action and has not developed a right to strike.¹⁶ Legislation is necessary in order to overcome the consequences that attach to strike action at common law and provide a right to strike free of potential adverse legal consequences.¹⁷ The protected action regime is an example of a specific legislative enactment of the right to strike.

As a result of the lack of an entrenched right to strike in Australian law, the existence of the right to strike will remain contingent and susceptible to abolition. As there is no domestic source of a binding obligation to respect the right to strike, the continued presence of the right is dependent upon the willingness of the Government of the day to continue to respect the existence of the right. Both the existence and the form of the right are susceptible to amendment or repeal, provided that the Government can obtain the passage of appropriate legislation through the Commonwealth Parliament. Therefore, there is no guarantee of the existence of the right into the future.

¹⁵ For discussion of the sources of legal obligation to respect the right to strike in Australia see chapter 5.

¹⁶ The traditional hostility of the common law in England to collective action, and to attempts by Parliament to protect collective action, were famously described by Sykes and Glasbeek: "it is incontrovertible that the common law became a reactionary force checking the growth of collective action in industry ... A cycle was set up: the judiciary would declare certain industrial activity illegal because of a contravention of a (newly discovered) ancient common law principle ... Parliament would declare the principle to be no longer binding on respectable trade unions; the statute would then be interpreted by the courts in such a manner that the ambit of protection it afforded was severely limited; or alternatively, it would be decided that although the statutory protection extended to certain acts which were ingredients of the now "permitted" nominal wrongs, it did not extend to those same acts when they also constituted wrongs not specifically protected by the statute. Frequently, of course, these individual cases of action had never been thought to be actionable wrongs before. The merry-go-round would therefore be set in motion again". E. I. Sykes and H. J. Glasbeek, *Labour Law in Australia* (Butterworths: Sydney, 1972) at 366-367. See also: K. D. Ewing, *The Right to Strike in Britain: Lectures on the Common Law* (vol. 2) (Kluwer Law and Taxation Publishers: Deventer, 1989) at 2-20. The developments in the English common law as a reaction to the passage of legislation granting specific legislative immunities to trade unions as discussed by Sykes and Glasbeek, and Ewing, were adopted by the Australian courts without the adoption of similar legislative immunities by the Australian Parliament: See E. I. Sykes, *Strike Law in Australia* (2nd ed., Law Book Company: Sydney, 1982) at 185-189.

¹⁷ For discussion of the position of strike action at common law see chapter 6 at 159-165.

The Enactment of the Right to Strike in Australia is Open to Manipulation

Under the *Industrial Relations Act* 1993 (Cth) (as amended by the *Industrial Relations Reform Act* 1993 (Cth)) (the 'IR Act (as amended)'), the protected action regime utilised the International Covenant on Economic Social and Cultural Rights (ICESCR) obligation to implement a right to strike for jurisdictional competence through the constitutional external affairs power.¹⁸ The domestic implementation of the ICESCR was constitutionally restricted to the enactment of legislation reasonably capable of being considered appropriate and adapted to implementing the Covenant.¹⁹ This fact provided a constitutional limitation on the content of the right to strike enacted on this basis. For example, the High Court held provisions under the IR Act (as amended) enabling employers to lockout their employees to be unconstitutional as an implementation of the ICESCR.²⁰

The *Workplace Relations and Other Legislation Amendment Act* 1996 (Cth) (WROLAA) shifted the jurisdictional basis of the protected action regime to, amongst others, the corporations power. This removed any obligation on the Commonwealth Parliament to ensure that the implementation of the right to strike reflects the form or content of ratified international instruments. This has removed any limitation (other than existing constitutional limitations on the scope of power of the federal government) on the form that the right to strike in domestic law takes. In consequence, the enactment of the right to strike is susceptible to manipulation for political purposes. An example is the political debate over pattern bargaining.²¹ The trade union movement engages in pattern bargaining as an exercise of the right to strike in an effort to obtain negotiated outcomes applicable in an industry wide context. This is antithetical to the stated objectives of the Federal Government to achieve enterprise based localised outcomes.²² Accordingly, the Federal Government has attempted to manipulate the parameters of the right to strike under the protected action regime in order to deny trade unions the ability to take protected action where

¹⁸ For discussion of the jurisdictional basis of the *Industrial Relations Act* 1988 (Cth) as amended by the *Industrial Relations Reform Act* 1993 (Cth) see chapter 5 at 136-143.

¹⁹ *Victoria v Commonwealth* (1996) 187 CLR 416 at 489.

²⁰ *Ibid* at 546-547.

²¹ For discussion of pattern bargaining see chapter 6 at 190-192.

²² For discussion of the use of pattern bargaining by trade unions and resistance from the Federal Government see: B. Ellem, 'Trade Unionism in 1999' (2000) 42 *Journal of Industrial Relations* 59; M. Watts, 'Wages and Wage Determination in 2000' (2001) 43 *Journal of Industrial Relations* 177.

the action is used to achieve outcomes contradictory to the policy objectives of the Coalition Government.²³

The Right to Strike in Australia Operates as a Distinct Discrete Enactment and Not as a Facet of the Principle of Freedom of Association

Unlike the construction of freedom of association adopted by the ILO, the right to strike in the federal labour law system is enacted separately to the principle of freedom of association. The right to strike exists in the protected action regime, serving the specific purpose of supporting the processes of bargaining for certified agreements and AWAs. The principle of freedom of association is contained within Part XA of the WRA, a separate and discrete enactment. In practical terms, this means that the WRA right to strike does not operate as an implicit element of the principle of freedom of association. It does not further the principle of freedom of association or provide a support mechanism for employees to associate and act in association. The distinction may appear academic, but it is extremely important in the context of measuring compliance. The ILO right to strike serves the purposes of association and is facilitative in nature. This encompasses a broad range of potential associational activities. The WRA right to strike, disconnected from the principle of freedom of association, serves the purposes of facilitating the bargaining regime. It does not extend beyond this narrow focus. Therefore, the breadth of the right to strike under the WRA may be manipulated by changing the bargaining environment and is not dependant upon a construction of legitimate associational objectives.

The enactment of freedom of association within the WRA is effected in practice by judicial interpretation of the freedom of association provisions. As discussed in chapter 6, the interpretation of the freedom of association provisions suggests that Part XA is not a discrete enactment. The Federal Court has suggested that freedom of association interacts with the protected action provisions to ensure that all employees

²³ See for example the *Workplace Relations Amendment (Genuine Bargaining) Bill* 2002 (Cth), and the significantly reduced version that was passed through the Commonwealth Parliament, *Australian Workplace Agreement (Genuine Bargaining) Act* 2002 (Cth).

have the right to engage in industrial activities.²⁴ However, while this judicial approach to freedom of association may extend the interaction between the right to strike and freedom of association beyond the literal text of the provisions, it does not overcome the differential enactment of the right to strike and freedom of association. Further, the impact of the 'whole of Act' judicial interpretative approach is dulled by the approach of the Federal Court to the freedom of association provisions more generally, which has occurred through a prism of individual rights rather than collective content.²⁵ The capacity to strike free of legal liability under the WRA is limited to the pursuit of predefined bargaining outcomes and does not exist in the broader occupational sense envisioned by the operation of the right to strike as a facet of the principle of freedom of association in international law.

Protected Action and Non-Protected Action

For the purposes of measuring compliance with international obligations, discussion of the right to strike must distinguish between protected action and non-protected action. The protected action regime establishes a model of bargaining within which strike action may be pursued free of potential legal liability. Provided that strike action conforms to the requirements of the protected action provisions, parties may exercise the right to strike. When measuring compliance, the relevant issue is the extent to which the protected industrial action provisions are compatible with the requirements acceptable in international standards. In this respect, the analysis must examine the requirements of notice, ballots, the extent of permissible strike action and the limits on such action. In this context the existence of the right to strike is not questioned. The analysis focuses on the extent to which the right provided within the WRA is an unhindered right.

²⁴ See *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463; *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* (2002) 114 IR 352. For discussion of the relationship between Part XA and the protected action provisions see chapter 6 at 207-214.

²⁵ Quinn argues that "the dominant approach [to interpretation of Part XA] perceives the principle [of freedom of association] as an individual right protecting discrete individual decisions ... [this] tends to limit the application of the Act's protections to conduct directed against specific individuals in relation to their individual actions and attributes; thus it protects the right of the individual to chose [sic] to be or not to be a union member". D. Quinn, 'To Be or Not to Be a Member – Is that the Only Question? Freedom of Association under the Workplace Relations Act' (2004) 17 *Australian Journal of Labour Law* 1 at 2.

Non-protected action is all possible industrial action that will be unprotected by the protected action regime. Where strike action is legitimate action within the ILO construction of freedom of association, but is unprotected by the WRA protected action provisions, the right to strike may be denied due to the potential liability that attaches to unprotected action.²⁶ Accordingly, the discussion will establish those areas of 'legitimate strike action' (within the ILO construction of freedom of association) that are unprotected in the federal model.

The WRA Enactment of the Right to Strike Lacks Internal Coherence

Standards developed by the ILO reflect the central tenet that strike action may be undertaken in support of the occupational activities of workers' organizations. The standards support this central premise, and restrictions and limitations on the ability to take strike action are assessed in accordance with the goal of ensuring that the right to strike maintains this function. ILO standards are developed with a coherent purpose.

The right to strike expressed within the protected action provisions lacks a central tenet. The role or purpose of protected action is not spelled out within the WRA objects or the Act itself, so there is no internal tool of measurement. Further, the actual provisions are neither consistent nor coherent, making it difficult to distil a central or dominant purpose to the enactment.

The role of the right to strike within a bargaining model will vary depending upon the objectives behind a specific enactment. A legislative enactment of the right to strike could serve the purpose of establishing compliance (or ostensible compliance) with international obligations. However, the protected action provisions have not been enacted to fulfil this objective. Reference to international labour standards does remain within the introductory objects of the WRA; however the jurisdictional basis of the protected action provisions is based on the corporations power (and other powers) removing all obligation to conform to international standards within the domestic enactment.²⁷ Further, the WRA separation of freedom of association and the right to strike does not reflect the functional inclusive approach manifested in ILO

²⁶ See chapter 6 at 159-165.

standards. Finally, the role of strike action within the WRA is considerably more restricted in terms of potential range than either the ICESCR or ILO standards.

Another purpose that could be served by the legislative enactment of a right to strike is to support a system of voluntary collective bargaining. The protected action provisions play this role, provided that parties are engaged in a form of voluntary collective bargaining conforming to the preferred model of the Federal Government. The protected action provisions acknowledge the need to provide a mechanism for parties to engage in bargaining under a model where compulsory arbitration no longer applies beyond the safety net. However, the provisions do not support true voluntary collective bargaining. Protected action is not available to determine the level of bargaining or the potential content of bargaining. Further, the ability of parties to pursue individual industrial action suggests that strike action was not designed to serve the purposes of **collective** bargaining.

The next purpose that may be ascribed to strike action under the functional freedom of association model of voluntary collective bargaining is to even the power imbalance between employers and employees, by providing employees with a weapon equivalent to the organizational and managerial power of employers. However, the protected action model does not seek to even any perceived imbalance, as employers and employees may undertake protected action equally. There is no suggestion that parties, even those negotiating AWAs, do not enter the negotiating process as equals and the weapons of strike and lockout are available equally.

The final role or purpose that may be ascribed to a legislative enactment of the right to strike is to support the regulation of employment through the operation of free market forces. On a superficial level the protected action provisions serve the private ordering of employment relations by providing immunity for strike action utilised in support of agreements negotiated freely between the parties and not imposed by the State or a public body. However, the protected action model only enables the right to strike to operate within tightly defined parameters, providing the right to strike in the context of a specific bargaining framework. The right to strike is available for the private

²⁷ For discussion of the jurisdictional basis of the WRA see chapter 5 at 143-146.

ordering of employment relations in the context only of negotiations for Division 2 or 3 certified agreements or an AWA, applicable at a single business or enterprise where the content of such agreement is artificially limited and tightly controlled. Beyond this restricted framework, the parties are not able to utilise the right to strike to enter agreements beyond enterprise level, agreements involving trade union related matters or even negotiate over retrospective strike pay. The bargaining relationship is tightly circumscribed by the WRA. This model is not based upon the interplay of free market forces as it only allows those forces to operate in a closely controlled environment.

The protected action provisions are not based upon any clear or established rationale for the existence of, or recognition of, the right to strike. Instead, if there is a purpose or rationale for the protected action provisions, it lies in ensuring that the right to strike is restricted in application to the attainment of bargaining outcomes consistent with the aims of Government policy.²⁸

Conclusion - Challenges to compliance

The preceding discussion of Australian law relating to the principle of freedom of association and the right to strike illuminated challenges for the federal labour law system in establishing compliance with international standards. In concluding the discussion of Australian law, the analysis will draw out these challenges as a prelude to the task of measuring compliance undertaken in chapter 8.

Australian law is not immune from concerns expressed by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) over the growing rise of individualism within industrialised economies.²⁹ ILO bargaining principles encompassing the right to strike do not embrace individualisation. The inclusion of

²⁸ For discussion of the Coalition Governments' industrial relations agenda see Wooden, *supra* note 13 at 178-184.

²⁹ In the 1996 General Survey, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) stated: "the Committee would like to express concern at two trends occurring in certain industrialized countries in particular, which have a negative impact on collective rights and hence on collective bargaining. First, in several countries there has been a recent tendency for the legislature to give precedence to individual rights over collective rights in employment matters". General Survey, *supra* note 1 at para 235. For discussion of the rise of individualism and contractualism in Australia see P. Waring, 'The Rise of Individualism in Australian Industrial Relations' (1999) 24 *New Zealand Journal of Industrial Relations* 291.

individually bargained agreements with access to protected industrial action poses an obstacle to Australian compliance with ILO standards. The Federal Government argues that it does not “promote” either collective or individual bargaining, but establishes “choices” for workers and business.³⁰ However, the emphasis placed on AWAs and a failure to actively promote collective bargaining has drawn criticism from the CEACR and the CFA.³¹ In reality, the provision of “choice” in bargaining structures is an edifice masking a predilection for individual bargaining, and constitutes an undermining of trade union strength. As Moir notes: “part of the theory behind individual bargaining involves a rejection of collective bargaining and trade unionism”.³² A similar view is expressed by Wedderburn: “[t]he new individualism recoils from freedom of association the more it incorporates an effective right to organise”,³³ and, it follows, an effective right to strike. The first challenge to effective compliance by federal labour law is the role of individualism in the Australian bargaining regime.

Related to the difficulties surrounding the individualisation of Australian labour law, is the promotion of an industrial relations agenda in Australia that challenges the necessity for recognition of the right to strike in order to ensure reciprocity in labour relations. Historically, in collective bargaining systems, strikes were accepted as a necessary, if unpalatable, weapon of the labour movement, without which bargaining was rendered meaningless in the face of the greater collective resources of employers.³⁴

³⁰ CEACR Individual Observations Concerning Convention 98, Australia, published 1999 and 2000; *Complaint against the Government of Australia presented by the International Confederation of Free Trade Unions ICTFU, the International Transport Workers' Federation (ITF), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA)*, Document Vol. LXXXIII, 2000, Series B, No. 1, Report 320, Case 1963. In an appearance before the Conference Committee on the Application of Standards of the International Labour Conference (the Conference Committee) in 1998, the Australian Government argued that Australia maintained adequate scope for collective bargaining and that AWAs provide an alternative to collective bargaining rather than their replacement: ILO Conference Committee Observation 1998, Australia, paras 21 and 61.

³¹ See CEACR Individual Observations Concerning Convention 98, Australia, published 1999 and 2000 and *Complaint against the Government of Australia*, supra note 30.

³² M. Moir, ‘Individual and Collective Bargaining in Australian Labour Law: The *CRA Weipa Case*’ (1996) 18 *Sydney Law Review* 350 at 359.

³³ Lord Wedderburn, *Employment Rights in Britain and Europe: Selected Papers in Labour Law* (Lawrence and Wishart: London, 1991) at 151.

³⁴ For example, Weiler argues that strike action is necessary to ensure that collective bargaining is not rendered “collective begging”. P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Carswell Company Ltd: Toronto, 1980) at 67. The general point has been made by a numerous commentators including R. Hyman, *Strikes*, (Fontana-Collins: London, 1972) at 60; O.

However, this conception of the necessity for the right to strike has come under attack from modern human relations and management theorists.³⁵ These writings critique the construction of employment in terms of power, arguing that employers and employees share more interests in common than those that divide them.³⁶ Trade union intervention is characterised as third party interference in the labour market, creating labour cartels monopolising and increasing the price of labour. According to this argument, the presence of trade unions creates unnecessary tension and conflict in an otherwise harmonious relationship between employer and individual employees. Market theories are applied to the labour market, hypothesising that employers will pay wages appropriate to attracting the best employees, and employees in turn, will have the ability to contract with those employers offering the best wages and conditions.³⁷ This construction of employment reasserts the principles of common law contract and the free market, viewing employment through the prism of individual rights and individual contracts.³⁸ The partial application of this model in practice can

Kahn-Freund and B. Hepple, *Laws Against Strikes* (Fabian Research Series: London, 1972) at 7-9; O. Kahn-Freund, *Labour and the Law* (2nd ed., Stevens and Sons: London, 1977) at chapters 1 and 3; T. Sharrard, *Competing Models of Worker Representation - The ILO Collective Bargaining Principles and Part VIB of the Industrial Relations Act 1988* (Centre for Employment and Labour Relations Law, University of Melbourne: Parkville, 1996) and Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18 *The Industrial Law Journal* 1.

³⁵ For discussion of the views of modern human relations and management theorists see S. Deery and R. Mitchell, 'The Emergence of Individualisation and Union Exclusion as an Employment Relations Strategy' in S. Deery and R. Mitchell, (eds.) *Employment Relations: Individualisation and Union Exclusion* (Federation Press: Annandale, 1999), 1.

³⁶ In Australia, these views are exemplified by the writings of the so-called 'New Right'. The New Right agenda has been fostered by the H.R. Nicholls Society, which campaigns for industrial relations reform along New Right policy lines. During the 1980's, the views of the Society were considered to represent a radical perspective on Australian industrial relations: B. Creighton, 'Trade Unions, the Law and the New Right' in K. Coghill, (ed.) *The New Right's Australian Fantasy* (Penguin Books: Fitzroy, 1987), 74. However, since the election of a Coalition Government in 1996, many of the proponents of these views, including Tony Abbott, Peter Costello and Peter Reith have been prominent in mainstream politics holding Ministerial Portfolios (both Tony Abbott and Peter Reith have been the Minister for Workplace Relations). Information on the H.R. Nicholls society sourced from www.hrnicholls.com.au. Examples of this view include: P. Costello, 'Dollar Sweets: Confronting Union Power' (1985-6) 39 *IPA Review* 49; P. Gorringe, 'A Contracting Theory View of Industrial Relations' (Paper presented at the *Light on the Hill: Industrial Relations Reform in Australia: the Proceedings of the H.R. Nicholls Society Queen's Birthday Weekend Conference*, Mooloolaba, 6 - 8 June 1987).

³⁷ Deery and Mitchell, *supra* note 35.

³⁸ For discussion of this model see Moir, *supra* note 32; Sharrard, *supra* note 34; T. Sheppard, 'Liberalism and the Charter: Freedom of Association and the Right to Strike' (1996) 5 *Dalhousie Journal of Legal Studies* 117 at 134-5.

be seen in the context of industrial relations and labour law under Thatcher in the United Kingdom and in New Zealand during the 1990's.³⁹

The construction of the labour market in economic contractualist terms may be appropriate to a select group of high level, highly skilled employees, but it does little for the bulk of employees with essentially fungible skills.⁴⁰ While the construction of the employment relationship through the prism of power has its weaknesses, the recognition of the right to strike is necessary in order for individual units of fungible labour to bargain collectively. This is the approach adopted by the ILO, and the predominance of the alternate view within the Federal Government in Australia poses a significant challenge to compliance.

Another obstacle to effective compliance relates to the basis of the employment relationship in common law contract. While strike action outside the protected action regime remains a breach of contract under the common law, workers will continue to face obstacles to exercising the right to strike. Strongly criticised by the CFA in 1991, common law breach of contract continues to provide a basis for injunctive relief and civil remedies outside the parameters of the WRA.⁴¹ As noted by Vranken, "the common law, built on the pillars of property and contract, cannot accommodate a

³⁹ For an example of the Thatcher model of contractualist industrial relations see S. Mills, 'The International Labour Organization, the United Kingdom and Freedom of Association: An Annual Cycle of Condemnation' (1997) 1 *European Human Rights Law Review* 35; Wedderburn supra note 34; For discussion of the model in New Zealand in the 1990's see G. Anderson, 'Implementing Collective Bargaining Policy through the Restriction of the Right to Strike' in R. Mitchell and J. Min Aun Wu, (eds.) *Facing the Challenge in the Asia Pacific Region: Contemporary Themes and Issues in Labour law* (Occasional Monograph No. 5, Centre for Employment and Labour Relations Law, University of Melbourne: Parkville, 1997), 157; B. Brooks, 'De-Regulating the Labour Market: Reflections on the New Zealand Experience' in C. Engels and M. Weiss, (eds.) *Labour Law and Industrial Relations at the Turn of the Century, Liber Amicorum in Honour of Roger Blanpain* (Kluwer Law International: The Hague, 1998), 651; A. Honeybone, 'Introducing Labour Flexibility: The Example of New Zealand' (1997) 136 *International Labour Review* 493.

⁴⁰ Moir, supra note 32 at 362.

⁴¹ *Complaint Against the Government of Australia presented by the International Federation of Air Line Pilots Associations (IFALPA)*, Document Vol. LXXIV, 1991, Series B, No. 1, Report 277, Case 1511, para 236. The CFA stated: "The Committee cannot view with equanimity a set of legal rules which:

- appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein;
- makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequence of their actions; and
- enables an employer faced with such action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct.

right to strike”.⁴² The common law serves to support a contractualist focus and will remain a challenge for compliance unless or until the WRA operates as an inclusive whole.

The difficulties in establishing an inclusive and holistic workplace relations system have led to the existence of a hybrid labour relations structure that is neither true conciliation or arbitration nor voluntary free collective bargaining. This uneven development exaggerates the lack of a coherent approach to the right to strike. Nominally included as a means to even the balance between labour and management, the right can be wielded by individuals, unionists and non-unionists alike, and may only be protected if used to obtain an agreement at an enterprise level. The protected strike action provisions, rather than facilitating a coherent ‘whole’ approach to bargaining are designed to encourage agreement-making that conforms to ideological and political objectives. This creates a challenge to compliance between the functional ILO right to strike and the nebulous WRA enactment.

The final challenge to compliance is the conflicting ideological approaches to the principle of freedom of association between ILO bodies and the WRA. Freedom of association within the ILO is constructed both collectively and functionally. This view of freedom of association is consistent across international enactments of freedom of association from a socio-economic rights perspective, but has not held true in common law jurisdictions (such as Canada and the United Kingdom)⁴³ and is divergent from the enactment of freedom of association within the WRA. As the functional collective approach to freedom of association constitutes a central and inescapable foundation of ILO jurisprudence concerning the role and function of voluntary collective bargaining and the right to strike, this clash of ideology may prove an intractable stumbling block in establishing and maintaining compliance.

The cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action to promote and defend their economic and social interests”.

⁴² M. Vranken, ‘Strike and the Individual Employment Contract: The New Zealand Case’ (1989) 19 Victoria University of Wellington Law Review 249 at 264.

⁴³ See the discussion of national and supra national jurisprudence in chapter 1 at 27-38.

Chapter Eight

Measuring Compliance

Introduction

This chapter will consider the extent to which the federal labour law system complies with voluntarily assumed international obligations with respect to the right to strike. Measuring compliance is not a simple matter of comparing Australian law with the international counterpart (although this chapter will undertake this exercise), because the international standards are not prescriptive norms. Owing to the collective and ideological content of the principle of freedom of association, the international standards are facilitative. Further, there is an inescapable connection between strike action and collective bargaining. Strike action does not occur in a vacuum but operates as an element of the broader bargaining regime. The following analysis will explore the question of compliance through both detailed comparison and consideration of the role accorded to strike action in the federal bargaining model.

Complexity in Measuring Compliance

Chapter 7 outlined potential obstacles to full compliance by Australian law with international standards on the right to strike. There is an additional obstacle arising from the nature of comparative study. Further, there are multiple levels of analysis of compliance.

The Challenge to Compliance Arising out of Comparativism

The object of this thesis is to assess the extent to which Australian law complies with voluntarily assumed international obligations. The exercise is not a comparison between domestic and internationally derived models, however there are lessons from the comparative process that are valuable for measuring compliance with international standards.¹

¹ For discussion of comparative literature examining the potential pitfalls involved with the comparative exercise see the Introduction at 17-19.

This study avoids the challenge faced by the comparative exercise of comparing domestic legal systems, with differing cultural, social and historical underpinnings, because the analysis involves international standards developed for universal application in domestic legal regimes. This avoids the need to tackle Kahn-Freund's warning concerning the wholesale transplantation of 'rules and institutions'.² However, the lesson to be learned from the comparative exercise is that it is important to be aware of legal, social and economic contexts even when dealing with internationally developed 'universal' standards.³

Straightforward prescriptive international norms present few obstacles provided that the relevant domestic regime has the existing political, legal and economic infrastructure to enable measurement. However, non-prescriptive norms, like the principle of freedom of association, are more difficult to assess. Non-prescriptive norms cannot be measured in terms of straightforward legal responses. Rather, these norms are pliant, requiring flexibility in adaptation and measurement. International Labour Organization (ILO) standards concerning the right to strike have developed from the principle of freedom of association and are non-prescriptive, flexible norms. They are not susceptible to simplistic measurements, and therefore the analysis must encompass social, economic and historical factors, bargaining models and ideological factors.

Equally, although ILO standards are designed to be universal in application, they have not developed in a vacuum. The ILO model developed out of a particular view of bargaining, freedom of association and the role of strike action.⁴ The challenge for the measurement of compliance is to adequately accommodate the contextual factors at play in both the domestic and international models.

² O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1 at 27.

³ For example, Von Prondzynski warns that "[t]he danger in applying international standards ... is to assume that there is one global scale on which performance of individual states can be measured". F. von Prondzynski, *Freedom of Association and Industrial Relations: A Comparative Study* (Mansell Publishing Ltd: London, 1987) at 25.

⁴ See discussion in chapter 1 at 34-36.

The Framework for Measuring Compliance

The analysis of compliance will proceed on the basis that there are two levels at which compliance may be usefully measured. The first of these is the formal legal structure, that is, the framework established under the *Workplace Relations Act 1996* (Cth) (WRA) for parties to pursue the right to strike and the legal framework applicable to unprotected strike action. The second level of analysis is the practical, exploring the effect of the legal framework in practice.

Regulatory Framework

The first and most important level at which compliance will be analysed is the legal framework in which the right to strike is regulated. This will involve examining legal rules and arrangements to establish the manner in which they accommodate the right to strike. ILO standards require that parties be able to freely pursue strike action within acceptable predefined limitations. The analysis will examine the legal framework to ascertain whether the limitations placed upon the exercise of the right to strike conform to this requirement.

The analysis will address the two forms of potential strike action identified in chapters 2-4. The first is strike action that constitutes the legitimate exercise of the right to strike implicit in the principle of freedom of association, the exercise of which should not be unduly impeded. The second is strike action exceeding the legitimate exercise of the right to strike, which may be restricted but which should not attract disproportionate penalties. For the purposes of measuring compliance, the phrase 'legitimate strike action' means strike action that is encompassed by the principle of freedom of association within ILO standards. Equally, the phrase 'illegitimate strike action' will be used to refer to strike action that falls outside the principle of freedom of association within ILO standards.

Practical Operation

The second level of analysis involves the application of the legal framework in practice. Where the practical effect of the legal framework is different from the strict application of the law, or where the legal framework has been manipulated to obtain an alternative result, the impact of the law will be considered. Further, are proposals introduced to alter the existing legal regime. While these proposals have not become

part of the legal structure, they demonstrate the application of the legal framework and the reaction of the Federal Government to the manner in which the system operates in practice.

The analysis of practical impact is less useful for measuring compliance than the analysis of legal regulation. The ILO tests compliance on the basis of the legal framework, rather than its practical application. ILO bodies consider the practical operation of legal structures, but will not excuse or justify an infringement of international standards by a legal rule on the basis of the application of the rule in practice. An example is CEACR commentary with respect to the Commonwealth *Crimes Act* 1914.⁵ Provisions in the legislation enabling restrictions on the right to strike have been consistently criticised by the CEACR as representing an unacceptable infringement on the right to strike. The CEACR accepts that the provisions have rarely, if ever, been used in practice, however the CEACR continues to call for the repeal.⁶ The practical operation of provisions that infringe the right to strike may provide some amelioration of non-compliance, but will not excuse the infringement.

Laws that have remained dormant or have had a muted effect in practice may regain legal significance at a future time. The existing political, economic or social context that has affected the practical impact of law may change and affect the manner in which the law is applied, interpreted or enforced. In order to ensure both present and future compliance, laws and legal structures must comply with the right to strike, and the lack of practical effect of structures that infringe the right to strike cannot justify or excuse that infringement.

⁵ For discussion of the *Crimes Act* 1914 (Cth) see chapter 6 at 223-224.

⁶ In the 1993 Direct Request on Convention 87, *The Freedom of Association and Protection of the Right to Organise Convention*, the CEACR requested information on the practical application of the *Crimes Act* 1914 (Cth). This was followed up in the 1995 Direct Request on Convention 87 where the CEACR noted "with interest" that the Australian Government was considering repealing ss 30J and 30K of the *Crimes Act*. In the 1998 and 2000 Observations, the CEACR repeated its concerns over the continued application of the relevant provisions of the *Crimes Act* and in 2000 expressed the "firm hope" that the Australian Government would take measures to amend the legislation. In the 2003 Observation, the CEACR stated: "The Committee ... reiterates its hope that the Government will take measures to amend this legislation, and requests the Government to keep it informed of any practical application of these provisions".

The practical impact of provisions cannot be determinative of compliance. However, without the practical element, analysis may be subject to criticism as a strictly legalistic exercise. The measurement of compliance on the practical level involves taking economic, social and ideological issues into account, and thus addresses the challenge to comparativism discussed in the previous section. Further, practical analysis provides evaluation of the federal model in a holistic manner.

Protected and Non-Protected Action

The final challenge to be addressed in measuring compliance relates to the structure of the model of voluntary collective bargaining adopted by the WRA. As discussed in chapter 7, the model provides immunity for strike action falling within the defined parameters of 'protected action'.⁷ Action undertaken outside these parameters remains vulnerable to potential common law or statutory liabilities. This means that there are two dimensions to measuring compliance within the federal model. The first dimension is the scope of legitimate strike action that is not protected under the WRA protected action provisions. The second dimension is the nature of the legal framework for protected action, in particular, the legal requirements for obtaining protection for strike action. ILO standards require that where the right to strike is exercised, obstacles should not exist that would render the right non-existent or extremely difficult to utilise in practice. This dimension requires assessment of the model provided for protected action, measuring the extent to which it enables the right to strike to be exercised freely.

Measuring Compliance – Australian Law, ICESCR and ILO Standards

The exercise of measuring the extent to which the federal bargaining model complies with international standards concerning the right to strike must distinguish between ICESCR and ILO standards because of the different levels of elaboration of standards under each instrument.

⁷ See chapter 7 at 236-237.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸

The first instrument considered here that sets out international standards on the right to strike is the ICESCR.⁹ The right to strike within Article 8(1)(d) of the ICESCR provides that State parties undertake to ensure the right to strike “provided that it is exercised in accordance with the laws of the particular country”. The absence of an effective ICESCR complaint mechanism means that the development of principles governing the implementation of this guarantee has been limited to observations of the Committee on Economic, Social and Cultural Rights (CESCR) on Reports of ICESCR signatory States. There are no guidelines establishing the content or extent of the right. CESCR commentary is arbitrary, elaborating only on those areas in which it has identified concerns with Member State practice. The absence of a General Comment on the scope and content of Article 8 means that there is no consistent body of principles against which the content of the obligation can be measured. Accordingly, in the context of the ICESCR it is necessary to measure compliance in a general, rather than a particular, sense.

The literal content of Article 8(1)(d) suggests that the federal labour relations system with respect to the right to strike complies with Australia’s obligations under the Covenant. Craven notes that the main theme emerging from CESCR commentaries is the necessity for the right to strike to be implemented through a legislative scheme without significant practical or legal impediments to its exercise.¹⁰ The federal bargaining model is broadly compliant with this principle. The WRA establishes a bargaining regime with a legislatively implemented right to strike. The exercise of the right to strike by employees and employee organizations in the form of protected action will not attract legal liability and employees are protected against dismissal.

⁸ The discussion of the ICESCR draws upon the material set out in chapter 2.

⁹ Given the general nature of Article 8(1)(d) of the *International Covenant on Economic Social and Cultural Rights* (ICESCR), it is not feasible to apply the two levels of analysis (legal and practical) discussed earlier in the chapter to the ICESCR standard. The discussion will focus on elaborating the content of the expression of the right to strike within the ICESCR.

¹⁰ M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press: Oxford, 1995), 278-281.

This analysis is supported by CESCR Observations on Australian State Reports concerning the domestic implementation of the ICESCR.¹¹ The CESCR has not expressed concern over the specific existence of a right to strike in Australia, although it has noted the limitations on the extent of the enactment, particularly in connection with restrictions on the right to strike in essential services.¹² The CESCR has recommended that restrictions on the right to strike in Australia should be limited to essential services in the strict sense of the expression, in accordance with ILO Convention No 87, the *Freedom of Association and Right to Organise Convention*, 1948, and to those civil servants who exercise the functions of the State.¹³

CESCR commentary provides little constructive analysis or discussion of the content of the right to strike contained within the ICESCR upon which to develop a more robust assessment of the WRA bargaining model and protected action. It is therefore difficult to measure compliance in further detail. However, the increasing willingness of the CESCR to use ILO standards for guidance with respect to the content of the ICESCR right to strike suggests that a measurement of compliance on the basis of ILO standards may reflect future expectations for compliance with the ICESCR.

The ICESCR is a generalist human rights instrument. The objective of the universal application of the Covenant is served through a lack of specificity. Despite the generalist and undeveloped nature of the ICESCR, the CESCR has been willing to state that the implementation of the right to strike in the area of essential services should conform to standards expressed in ILO quasi-jurisprudence. While it appears that Australia formally complies with the ICESCR right to strike, substantive compliance with the content of the right is not yet measurable, or is only measurable according to ILO standards.

¹¹ Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, *Concluding Observations on Economic, Social and Cultural Rights: Australia*, 01/09/2000, United Nations Doc. No. E/C.12/1Add.50, at 68, paras 378 and 379; Third Periodic Report: Australia, *Implementation of the International Covenant on Economic, Social and Cultural Rights*, United Nations Doc. E/1994/104/Add.22 – 23 July 1998. Australia's fourth periodic report under Article 16 is due to the CESCR on 30 June 2005.

¹² CESCR Concluding Observations, Australia, 2000, *supra* note 11 at para 394.

¹³ *Ibid.*

As noted in chapter 2, it remains unclear whether or not implementation of the right to strike under the ICESCR is limited to the promotion and protection of the specific employment interests of trade union members, or whether the right extends to broader social and economic issues affecting workers generally.¹⁴ The right to form and join trade unions under Article 8(1)(a) is limited to the promotion and protection of the economic and social interests of the trade union members, but this limitation is not repeated in Article 8(1)(d). Accordingly, it is unclear whether or not the ICESCR right to strike extends to issues of broader social concern. The location of Article 8(1)(d), within an Article protecting trade union interests, and the general limitation contained within Article 8(1)(d) itself, suggests that interpretation of the Covenant may encompass limitations on the exercise of the right to strike in line with Article 8(1)(a). However, this argument must be balanced against the willingness of the CESCR to utilise ILO standards for the enunciation of the content of the right.¹⁵ ILO principles on the scope of legitimate strike action are broader than the limitation in Article 8(1)(a), suggesting that Article 8(1)(d) could be interpreted in a broader sense. Were the narrow interpretation to be accepted, Australian law would remain broadly compliant, as the right to strike is restricted to enterprise bargaining over matters related to the employment relationship (although this may be considered to constitute a narrow application of the right). However, under the broader interpretation, the narrow scope of the right in Australia would be non-compliant.

International Labour Organization (ILO) Standards¹⁶

The ILO principles concerning the right to strike are the most comprehensive in international law. As noted, ILO standards operate within a model of voluntary collective bargaining. The Australian system, having adopted such a model, can be appropriately measured against ILO principles.

As explained in chapters 1 and 3, there is no express right to strike in ILO instruments, as it is constructed as implicit in the principle of freedom of association. In this context, two of the challenges to Australian compliance raised in chapter 7

¹⁴ See chapter 2 at 58-60.

¹⁵ See chapter 2 at 55-57.

were the modern ideological challenge to the necessity for the right to strike in labour relations and competing approaches to the principle of freedom of association.¹⁷

While it is important to acknowledge the existence of these challenges, the ILO interpretative approach to freedom of association is binding upon Australia in international law while Australia remains a party to relevant ILO Conventions or a Member of the ILO. Consistency in approach at international level and in domestic commitment is important in order to ensure that the right to strike is not diminished or sacrificed in favour of domestic economics, politics or short term gains and to ensure that international obligations are met.

Utilising the tools of black letter analysis and discussion of the practical impact of the law, the analysis will now measure the degree to which the WRA model of protected action complies with ILO standards on the right to strike. The analysis will address the two dimensions outlined in the preceding discussion, namely the extent to which the model permits the exercise of legitimate strike action through the protected action framework and then, the content of protected action itself, examining possible impediments to the exercise of the right in practice.

Dimension One - The Scope of the Right to Strike

The ILO model provides for voluntary collective bargaining wherein State parties set the parameters of their domestic bargaining structures. The ILO model does not dictate the form or content of structures governing the role of strike within those systems beyond three basic principles:

1. the structure should support a right to strike broad enough to encompass legitimate expressions of the right to strike;
2. the structure should not hinder the exercise of the right to strike or impose obstacles that would render the exercise of the right in practice nugatory; and
3. legal responses to illegitimate strike action should be measured and proportionate.

¹⁶ The discussion of Australian compliance with ILO Standards draws upon the enunciation of standards set out in chapter 3 and the statement of Australian law set out in chapter 6.

¹⁷ See chapter 7 at 239-243.

The Australian model of voluntary collective bargaining operates in accordance with normative collective bargaining principles. Where parties bargain **within** the system, they are able to avail themselves of the protections afforded by the protected action regime, including the right to strike. Where parties bargain or seek outcomes **outside** the set parameters of the model, the protections are not available. However, the model fails to accommodate all of the ILO requirements set out above. Structurally, the model accommodates a form of the right to strike, allowing parties to take unhindered strike action in limited circumstances. However, this right to strike is not broad enough to encompass all legitimate strike action and allows for the imposition of disproportionate legal responses to both unprotected legitimate strike action and illegitimate strike action.

ILO standards require legitimate strike action to fall within the scope of action protected from liability or, at least, unhindered by other laws. The Australian model provides protection for strike action supporting negotiations for an enterprise level agreement and compatible with all legislative prerequisites. All other strike action: socio-economic, multiple business, industry, sympathy or trade union orientated, is denied protection and must run the gauntlet of compensatory or injunctive remedies available to those with a cause of action. This is the crux of the compliance issue in Australia. ILO bodies consider that where legitimate industrial action falls outside the scope of the protected action provisions, the right to strike is effectively denied. It has been the consistent view of the CEACR that where legitimate strikes in Australia are unprotected, the failure of Australian law to accord protection to the strike action constitutes a breach of the obligation to respect the right to strike.¹⁸

In contrast to the CEACR view, the Australian government argues that the failure to provide express protection to the right to strike in all forms recognised under the principle of freedom of association does not constitute a failure to comply with

¹⁸ The CEACR Observations of 1999 and 2001 noted the possibility that in Australia legitimate unprotected industrial action could be subject to injunctions or civil liabilities and requested that all legitimate strike action be brought under the protected action scheme: *CEACR Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organization, 1948, Australia, 1999*; *CEACR Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organization, 1948, Australia, 2001*.

international standards, because the exercise of the right to strike outside the protected action regime is not expressly prohibited under Australian law:

[t]he Government reiterates in its report that the Act does not expressly prohibit strike action (except in relation to the period during which a collective agreement under the Act is in operation) but rather provides for certain industrial action to be protected from civil liability; in its view, the conditions to be fulfilled before taking industrial action are reasonable and appropriate in the context of the national system as a whole.¹⁹

This argument by the Federal Government conceives of the federal labour law system as an interrelated whole, providing scope for voluntary collective bargaining in the context of the objectives of the system. The circumstances in which strike action is protected conform to the vision of the system as instituted, wherein strikes are protected if parties are pursuing bargaining outcomes expressly sanctioned by the system. However, this argument has been consistently rejected by the CEACR, which has reiterated that all forms of strike action considered legitimate in the context of the principle of freedom of association should be encompassed by a voluntary collective bargaining model.²⁰

The ongoing dialogue between the Federal Government and the CEACR reflects a difference of approach with respect to the role of strike action within a bargaining model and a differing construction of the concept of unlawfulness. The disagreement over these matters has resulted in a compliance impasse whereby the CEACR asserts non-compliance and the Government reasserts its earlier position.²¹

The role of strike action within a bargaining model that is structured in accordance with the principle of freedom of association is conceived in different terms by the CEACR and the Federal Government. The functional interpretative approach adopted by the ILO in the enunciation of standards supporting the principle of freedom of

¹⁹ CEACR *Individual Observation Australia*, Convention 87, 2001.

²⁰ CEACR *Individual Observations Australia*, Convention 87, 1999, 2001, 2003 and 2004.

²¹ *Ibid.* In the 2001, 2003 and 2004 Observations, the pattern is repeated. The CEACR sets out the position of the Federal Government (as set out above) and the CEACR calls for reform of the law. The 2003 and 2004 Observations use the strongest possible CEACR language to note “with regret that the Government reiterates that it is not contemplating any legislative reform to bring its legislation into conformity with the Convention”. For discussion of the language used by the CEACR see chapter 3 at 80-83.

association, constructs the right to strike as facilitative of freedom of association, serving the function of balancing relative weights of industrial parties in the context of a voluntary and deregulated bargaining regime. This approach requires that the right to strike facilitate the functioning of the system as a tool of voluntary bargaining. This construction of freedom of association necessitates the inclusion of a broader right to strike than that provided under protected action in the federal labour law system because the protected action model does not allow for the parties to be voluntary actors setting their own bargaining parameters. On the contrary, it allows for a limited balancing of bargaining power in a limited bargaining model.

There is a further difference in approach between the Federal Government and the CEACR to the concept of unlawfulness and strike action. The CEACR considers that the existence of civil or other penalties for legitimate but unprotected strike action is in violation of the right to strike. As noted, the Government response - that unprotected strike action is not expressly prohibited, and further that the limitations on protected action are reasonable and appropriate in the context of the national system - provides no answer. It merely deflects the critique and avoids directly dealing with the non-compliance issue raised. While it will not be illegal for an employee organization, or an employee, to engage in strike action falling outside the protected action regime, it will be unlawful in the sense that it could form the basis of any number of claims under the common law or statute. Further, it could be subject to injunctive relief and subsequent contempt proceedings.²² Expressly rendering unprotected strike action illegal would be a serious breach of freedom of association, but it does not logically follow that a failure to render such strike action illegal means that no breach of the principle has occurred. The CFA stated as early as 1991 that the common law regime and injunctive relief available against otherwise legitimate strike action in Australia was in violation of the principle of freedom of association and, with the exception of the limited protected action regime, this has not changed since 1991.²³

²² See discussion in chapter 6 at 159-165.

²³ *Complaint Against the Government of Australia presented by the International Federation of Air Line Pilots Associations (IFALPA)*, Document Vol. LXXIV, 1991, Series B, No. 1, Report 277, Case 1511.

Accordingly, where the protected action regime fails to protect legitimate strike action against legal process and civil liability, the federal system is incompatible with the principle of freedom of association and the right to strike. It is insufficient to suggest that strikes are not 'prohibited' to avoid this conclusion.

The following discussion will explore the parameters of the federal WRA protected action regime in order to establish the scope of legitimate strike action that will or will not be protected.

Definition of Strike Action

ILO standards governing the right to strike implicit in the principle of freedom of association provide that a definition of strike action should not exclude forms of action that constitute legitimate exercises of the right to strike. Strike action should encompass all nuances of concerted action that may be undertaken in support of the collective. The parties should be free to choose the form of action, provided the action remains peaceful.

The regulation of industrial action in the federal jurisdiction reflects the approach taken by ILO standards. The definition of "industrial action" in the WRA is expansive, encompassing the traditional view of strike action as a total stoppage of work and a range of other practices including work bans, go slow, rolling stoppages or work to rule.²⁴ The application of the broad definition means that if industrial action is undertaken in accordance with the protected action provisions, parties to the action may choose the form that their action will take.

The broad WRA definition of industrial action means that the lawfulness or otherwise of the majority of strike action will not be determinable on the basis of the form that the action takes. This is appropriate in the context of ILO standards. However, there are two issues arising from the definition that cause potential compliance difficulties. These are the exclusion of peaceful picketing and the inclusion of individual strike action.

²⁴ See chapter 6 at 167-170.

Exclusion of Peaceful Picketing

The decision in *Davids Distribution*²⁵ held that peaceful picketing was excluded from the definition of “industrial action” under the WRA.²⁶ Where parties engage in peaceful picketing, their action cannot be protected for the purposes of the protected action regime.²⁷ As peaceful picketing is a legitimate form of strike action under ILO standards, this exclusion does not comply, especially if peaceful picketing remains potentially subject to legal sanctions.

The effect of the decision in *Davids Distribution* on otherwise protected action involving peaceful picketing has not yet been fully explored in the case law. If strike action undertaken in accordance with the protected action regime includes peaceful picketing, does the entirety of the strike action lose protected status, or only the picketing element of the action? If the former applies then the loss of protection would leave the action open to potential legal liability as unprotected action. In such a case, the form that legitimate strike action takes would determine lawfulness, and this would breach ILO standards. However, if it was only the picketing element of the action that was denied protection, then compliance would be more difficult to measure. Peaceful picketing of itself is not inherently unlawful. If the participants in the action are protected by the protected action regime from claims under the law of contract (breach of contract) or the industrial torts (such as interference in contractual relations),²⁸ then there is nothing inherently unlawful in the act of peaceful picketing itself. This would suggest that provided the act of picketing remains free of legal sanction and the remainder of the action is protected, the exclusion of peaceful picketing from the definition of “industrial action” under the WRA would not create a significant compliance problem.

Individual Action

The WRA definition of “industrial action” encompasses action undertaken by a collective but is also capable of encompassing activities of an industrial nature

²⁵ *Davids Distribution Pty Ltd v National Union of Workers* (1999) 91 FCR 463 (*Davids Distribution*).

²⁶ See discussion of the decision in *Davids Distribution* in chapter 6 at 169-170.

²⁷ *Davids Distribution*, supra note 25.

²⁸ See discussion in chapter 6 at 159-165.

undertaken by an individual.²⁹ The definition does not require collectivity to be present in order to satisfy its terms, whereas ILO standards do not include individual action within the definition of strike action. However, this difference is not material because the ILO standards do not specifically exclude the possibility of individual industrial action. Therefore the inclusion of scope for individual industrial action within the definition of “industrial action” in the WRA, however unlikely it is that individual action will occur in practice, does not create a compliance problem in and of itself. On the contrary, the flexible nature of the ILO standard allows for differentiation of approach within national legislation.

However, the difference is indicative of a broader ideological conflict. The ILO model aims to ensure the free pursuit of voluntary **collective** bargaining, whereby the right to strike is a weapon possessed by the collective who may utilise strike action to serve associational objectives and to maintain a balance of power in the bargaining equation. The ability to pursue individual strike action in the federal WRA bargaining model demonstrates a significantly different approach to the role and purpose of strike action within Australian law. Strikes are seen as serving the functional role of supporting negotiation within bargaining. This is a significantly more limited conception of the role of strike action in a model of voluntary collective bargaining to that embraced by the ILO.

The ability of the WRA definition of “industrial action” to encompass individual action does not create a compliance problem at this preliminary definitional stage. However, it foreshadows a substantial differentiation in approach to the role and function of strike action by the federal WRA model and the ILO quasi-jurisprudence which creates compliance difficulties to be discussed below.

The Legitimate Objectives of Strikes

Within ILO standards, strike action undertaken for the furtherance and defence of the interests of workers or employees is encompassed by the principle of freedom of association. Strikes aimed at protecting the occupational interests of strikers, including strikes related to the social or economic policies of government are

²⁹ See chapter 6 at 169.

legitimate, while strikes of a political nature are not. The following discussion will consider the motivations required of strikers in order to undertake protected action under the WRA. Outside the protected action regime, questions of motivation or purpose are not relevant in any cause of action that may exist against strike participants, except perhaps in the context of occupational health and safety or an order under s 127.³⁰

In the federal system the protected action model serves the specific purpose of facilitating bargaining for collective or individual agreements.³¹ Section 170ML provides that protected status is only available where the purpose of the action is to support or advance claims in respect of the proposed certified agreement that is the subject of the bargaining period, or in response to such action by the other party. The only acceptable motivation is the advancement of interests relevant to the agreement to be negotiated. Further, the AIRC can terminate a bargaining period, removing the ability to take protected action, where parties are not genuinely trying to reach agreement.³² In addition, certification of an agreement requires that the agreement pertain to the relationship between an employer and employees.³³ Strike action, in this context, is for one purpose only, and the provisions are designed to stop parties utilising the protected action provisions if they have other agendas.

ILO standards accord legitimacy to strike action engaged in for socio-economic, trade union or sympathy purposes. The focus of protected action on the terms of collective agreements excludes all three of these possible motivations from protection.

Socio-Economic Motivations

Strike action with socio-economic motivations will only be protected under the WRA protected action provisions if the action is also directed at advancing interests in relation to a proposed certified or individual agreement. Therefore, issues of broader social or economic concern may only be valid motivations for strike action if they

³⁰ For discussion of the relevance of 'motivation' to cases of action against parties engaged in unprotected industrial action see B. Creighton and A. Stewart, *Labour Law: An Introduction* (3rd ed., Federation Press: Sydney, 2000) at 408.

³¹ See discussion in chapter 6 at 175-182.

³² WRA s 170MW and see discussion in chapter 6 at 185-189.

coincide with specific proposed clauses in an agreement. All specific provisions must pertain to the relationship between employer and employee.³⁴ Regardless of the intention or motivations of the claimant, where claims are made in a proposed agreement that are not capable of certification, protected action will lose protected status.³⁵

Trade Union Motivations

A strike undertaken by an organization which relates to matters of internal trade union security, industrial coverage, a demarcation dispute or the status of organizations, will not receive protection under the WRA protected action regime. Strike action aimed at achieving outcomes of this nature may pertain to a relevant proposed certified agreement by seeking relevant clauses in the proposed agreement, but would not meet the requirement that they pertain to the relationship between an employer and employee.³⁶ Further, the AIRC is able to suspend or terminate a bargaining period, removing protected status, where a strike involves a demarcation dispute or industrial coverage.³⁷

Sympathy Strikes

Sympathy strikes, where an organization engages in industrial action which has the purpose of supporting claims made by another organization, will not be covered by the protected action provisions. Further, such action could affect the protected status of the strike action undertaken by the organization that is being supported. Industrial action will lose protected status where it is engaged in, or organised, in concert with one or more persons or organizations that are not protected persons if there is any degree of “acting in concert” involved.³⁸

³³ WRA s 170MI and *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40, 2 September, 2004, unreported judgment.

³⁴ WRA s 170MI; *Electrolux*, supra note 33.

³⁵ *Ibid.*

³⁶ For discussion of the requirement that an agreement pertain to the relationship between employer and employee see *Electrolux*, supra note 33 and *K. L. Ballantyne and National Union of Workers*, AIRC, PR 952656, 22 October, 2004 and chapter 6 at 175-180.

³⁷ WRA s 170MW.

³⁸ WRA s 170MM. For an example of the loss of protection for “acting in concert” see: *National Workforce Pty Ltd and Others v Australian Manufacturing Workers' Union and Others* (1997) 75 IR 200; *National Workforce Pty Ltd v Australian Manufacturing Workers Union* [1998] 3 V.R. 265 and the discussion in chapter 6 at 189-192.

ILO standards dictate that parties are able to undertake strike action in sympathy with other workers. Secondary boycott conduct is unlawful under both the TPA and WRA.³⁹ Protected industrial action will lose protection if it involves a secondary boycott.⁴⁰ Significantly, the CEACR has been critical of this situation in Australia on numerous occasions.⁴¹

Conclusions – Legitimate Strike Objectives and Australian Law

The protected action regime under the WRA does not comply with ILO standards in that it fails to encompass the full range of objectives of strike action considered legitimate within ILO quasi-jurisprudence. In confining the scope of potential protected action to the certified agreement concerned, the model fails to recognise the broader construction of freedom of association adopted by the ILO. Within the ILO framework, the occupational interests of workers and employers are construed to extend beyond the regulation of the employment relationship and to include trade union affairs, broader socio-economic issues and sympathy strikes. The exclusion of these legitimate objectives from the protected action model is not in conformity with ILO standards.

Level of Bargaining

Under ILO standards, the level at which parties bargain is a matter to be determined between the parties themselves. Strike action is a legitimate industrial tactic to facilitate the resolution of disputes concerning the level at which agreements will be made. In this model, the market determines bargaining levels and workers' organizations can legitimately influence the market through the use of strike action.

³⁹ See the discussion of secondary boycotts in chapter 6 at 214-222.

⁴⁰ WRA s 170MM.

⁴¹ The CEACR has been consistently critical of the Australian secondary boycott regime. In the 1999 Observation, the CEACR reaffirmed its view that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided that the initial strike that they are supporting is lawful. These Observations were repeated in the 2001 and 2003 Observations. CEACR *Individual Observations Australia*, Convention 87, 1999, 2001 and 2003. In the 2004 Observation the CEACR stated "The Committee recalls once again that a general prohibition of sympathy strikes could lead to abuse The Committee again expresses the firm hope that the Government will amend the legislation [the TPA] accordingly, and requests it to continue to provide information on the practical application of the boycott provisions". CEACR *Individual Observation Australia*, Convention 87, 2004.

Under the federal WRA model of voluntary collective bargaining, protected strike action is not available to facilitate disputes concerning the level at which bargaining takes place. Protected action is only available where parties choose to bargain at a level permitted by the WRA. A bargaining period may only be initiated in relation to the negotiation of an agreement to apply to employees employed in a single business or part of a single business.⁴² That is, protected action will only be available where parties choose to negotiate an agreement at **enterprise** level. While an agreement covering more than one place of business can be certified, strike action undertaken in support of that agreement will not be protected.⁴³ This approach to voluntary collective bargaining restricts the ability of the parties to undertake negotiations as voluntary actors in a free market bargaining environment. The scheme of the WRA pre-determines the market in which bargaining can take place. This constraint is incompatible with ILO standards that dictate that the parties themselves must be free to choose the level at which they bargain.

Notably, CEACR commentary has been critical of the restriction on the availability of protected action to bargaining at the enterprise level, arguing that it

effectively denies the right to strike in the case of the negotiation of multi-employer, industry wide or national level agreements, which excessively inhibits the right of workers and their organizations to promote and protect their economic and social interests.⁴⁴

The criticism was repeated in 2003 and 2004 where it was noted that workers organizations should be able to take industrial action in support of multi-employer agreements.⁴⁵

The restriction of protected action to enterprise level bargaining denies protection to parties engaging in other effective forms of strike action, including those carried out beyond the enterprise level. Strike action, as a display of bargaining strength, can be potent when conducted across employers, unions or industries. Restricting protected

⁴² See discussion in chapter 6 at 170-172.

⁴³ For discussion concerning the certification of multi-business agreements see chapter 6 at 172-173.

⁴⁴ CEACR *Individual Observation Australia*, Convention 87, 1999. This statement was repeated in 2001: CEACR *Individual Observation Australia*, Convention 87, 2001.

⁴⁵ In 2003 and 2004 the CEACR stated that “workers’ organizations should be able to take industrial action in support of multi-employer agreements without running the risk of being sanctioned”, CEACR *Individual Observations Australia*, Convention 87, 2003 and 2004.

action to the level of the enterprise operates as a restraint on the effective exercise of the right to strike, rendering it a less potent and less threatening workers' right.

The passage of proposed legislation to prevent the practice of pattern bargaining would exacerbate non-compliance.⁴⁶ The tactic of pattern bargaining has been successful when undertaken by unions working within the limitations of the current protected action model. The tactic remains vulnerable under the existing regime because it risks a declaration that the parties are not "genuinely trying to reach agreement".⁴⁷ However, the passage of the proposed law would further hinder the choices of industrial parties in this area as to the level at which they wish to bargain.

Strikes Undertaken During the Currency of an Agreement

It is not contrary to the ILO principle of freedom of association to restrict the ability of parties to take strike action during the currency of a collective agreement. Such restriction, however, should only apply to those rights established under the agreement and should not prevent strike action relating to the further occupational interests of the workers subject to the agreement.

This approach to strike action undertaken during the currency of a collective agreement embraces a rights/interests distinction. This has, in principle, been adopted by the federal WRA model.⁴⁸ However, the law remains unclear on whether or not strike action undertaken in furtherance of an interest dispute during the currency of a collective agreement can be protected action.⁴⁹ ILO standards require that parties be able to exercise the right to strike in these circumstances, which means that the WRA model is non-compliant if such action cannot be protected. The increasing use of 'no extra claims' clauses in certified agreements further muddies the water. Parties should be able to negotiate their own terms; however the blanket inclusion of no extra claims

⁴⁶ For discussion of pattern bargaining see chapter 6 at 190-192.

⁴⁷ See the decision of Munro J in *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union & Ors*, AIRC, Print T1982, 16 October 2000.

⁴⁸ WRA s 170MN. This also applies during the currency of a s 170MX(3) award. For discussion of the rights/interests distinction under the WRA bargaining regime see chapter 6 at 180-182.

⁴⁹ See *Emwest Products Pty Ltd v AFMEP&KIU* [2002] 112 IR 388 per Kenny J; *Integrated Metal Services*, unreported judgment, AIRC, PR934714, 4 July 2003, SDP Williams and chapter 6 at 180-182.

terms in certified agreements could have the effect of denying the right to strike for interest disputes during the currency of certified agreements.

The Repercussions of Strike Action

ILO standards pertaining to the principle of freedom of association provide that participation in legitimate strike action should not have legal repercussions, and that where parties engage in illegitimate strike action, it will not be contrary to the principle of freedom of association to impose legal sanctions provided that the sanctions are proportionate to the offence committed.

In the federal WRA model, the distinction between protected and unprotected industrial action is not based on the ILO construction of the legitimacy or otherwise of strike action. Participants in protected action are protected from legal sanctions and can freely exercise a right to strike. All other strike action is subject to common law, statutory and injunctive action.⁵⁰ The repercussions of strike action under the federal model need to be examined at two levels. First, the repercussions that flow from undertaking legitimate unprotected action and second, those that affect illegitimate unprotected action.

Legitimate Unprotected Industrial Action

It has already been noted that unprotected legitimate strike action attracts legal sanctions and this is incompatible with ILO freedom of association principles. The potential legal consequences in common law contract, tortious action, injunctive relief or breaches of the TPA secondary boycott provisions were canvassed in chapter 6.⁵¹ The CFA summed up the position of unprotected legitimate strike action in 1991:

The Committee cannot view with equanimity a set of legal rules which:

- (i) appears to treat virtually all industrial action as a breach of contract on the part of those who participate therein;
- (ii) makes any trade union or official thereof who instigates such breaches of contract liable in damages for any losses incurred by the employer in consequence of their actions; and

⁵⁰ See chapter 6 at 159-165.

⁵¹ See chapter 6 at 159-163 for common law contract, 164-165 for tortious or injunctive relief and 214-222 for discussion of the TPA secondary boycott regime.

- (iii) enables an employer faced with such action to obtain an injunction to prevent the commencement (or continuation) of the unlawful conduct.

The cumulative effect of such provisions could be to deprive workers of the capacity lawfully to take strike action to promote and defend their economic and social interests.⁵²

An area of law that was not canvassed in 1991 as it had not yet been enacted is the position of unprotected legitimate strike action under s 127 of the WRA.

Section 127 Orders

Legitimate unprotected industrial action may be subject to an order under s 127 of the WRA.⁵³ Section 127 orders may be issued by the AIRC to stop impending, probable or actual industrial action. As outlined in chapter 6, the leading case with respect to s 127 orders, *Coal and Allied*, classified industrial action under the WRA as prohibited, protected and unprotected.⁵⁴ The application of s 127 orders and the exercise of discretion by the AIRC with regard to prohibited and unprotected action are relevant to this discussion.

Prohibited industrial action is actively prohibited, for example, in relation to boycott conduct or strike pay.⁵⁵ An order under s 127 that action cease because it relates to a claim for strike pay or to secondary boycott conduct would be a prima facie breach of ILO standards, as both are legitimate expressions of the right to strike implicit in the principle of freedom of association.

Unprotected industrial action is action that is neither prohibited nor protected by the WRA. Where unprotected industrial action takes place, s 127 orders may be granted at the discretion of the AIRC. However, the availability of s 127 orders (and subsequent injunctions in the Federal Court) against legitimate unprotected action is incompatible with ILO principles on freedom of association. On the practical level, the existence of the AIRC discretion enables the AIRC to take into account a wide range of factors

⁵² *Complaint against the Government of Australia*, supra note 23, para 236.

⁵³ For discussion of s 127 orders under the WRA see chapter 6 at 197 - 202.

⁵⁴ *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors* (1997) 73 IR 311.

related to the industrial action, which, to some degree, ameliorates the non-compliance.

Illegitimate Unprotected Industrial Action

Employees involved in illegitimate unprotected industrial action may be subjected to legal sanctions or dismissal. ILO standards require that legal responses to illegitimate strike action be proportionate to the degree of illegitimacy involved.

Legal Sanctions

Certain forms of strike action, for example, strikes undertaken for political purposes or non-peaceful strikes, fall outside the principle of freedom of association and are illegitimate. The issue to be considered is whether the legal response in the federal model to illegitimate action is proportionate to the offence committed.

Illegitimate strike action can be subjected to an array of sanctions. First, under the common law, a strike will constitute a breach of the employment contract, rendering the employee concerned liable to dismissal. The breach of employment contract will form the basis of potential liability under the industrial torts pertaining to combination between workers and trade unions. Further, the TPA prohibits secondary boycotts and contains substantial penalties. In addition, a range of possible consequences may flow from the application of provisions of the WRA including orders under s 127.

The sanctions reflect the development of common law rules designed to stifle combination and punish strikers.⁵⁶ The laws have not developed to maintain proportionality or on the foundation of an existing right to strike. They reflect the haphazard and reactive approach to the development of law in the context of the existence of the conciliation and arbitration system and the hostility of the common law to combination.⁵⁷

⁵⁵ For discussion of the prohibition of boycott conduct see chapter 6 at 189-190. For discussion of the prohibition of strike payments see chapter 6 at 195-196.

⁵⁶ E.I. Sykes and H.J. Glasbeek, *Labour Law in Australia* (Butterworths: Sydney, 1972) at 366-367 and see chapter 7 at 232-233.

⁵⁷ Ibid.

In consequence, illegitimate industrial action may be subject to an array of sanctions disproportionate to the illegitimacy involved. With the notable exception of s 127 orders, there is no attempt to quantify the degree of the offence committed, the degree of illegitimacy or to impose an appropriate sanction. Appropriate sanctioning of illegitimate industrial action requires a re-examination of the law and the development of a process flexible enough to accommodate both minor and substantial deviations. This would constitute a radical readjustment of the law, especially the common law, and a rethinking of the manner in which the regulatory system approaches all forms of industrial action.

Dismissal from Employment

The dismissal of a worker in consequence of participation in legitimate strike action constitutes serious discrimination in employment and a curtailment of the right to strike under ILO standards. Termination of the employment of a worker for participation in illegitimate strike action may be disproportionate to the offence committed.

A worker cannot be dismissed under the federal system for engaging in protected strike action.⁵⁸ However, unprotected strike action can result in dismissal under the common law doctrine of repudiation of contract. Any strike action by an employee may constitute a breach of contract enabling the summary termination of the employment contract by the employer. The availability of unfair dismissal provisions to many employees with does not overcome the non-compliance involved.⁵⁹

With respect to illegitimate action, dismissal may constitute a disproportionate sanction, given that the cause of action is not linked to the seriousness of the offence committed. Any strike action, from the smallest and least disruptive act to the most serious act, potentially constitutes grounds for termination. The nature of the offence,

⁵⁸ WRA s 170MU. See discussion in chapter 6 at 175.

⁵⁹ The United Nations Committee on Economic, Social and Cultural Rights, interpreting Article 8(1)(d) of the ICESCR stated that "[t]he Committee does not find satisfactory the proposal to enable employees who go on strike to have a remedy for unfair dismissal. Employees participating in a lawful strike should not *ipso facto* be regarded as having committed a breach of the employment contract": *Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland*, 04/12/97, E/C.12/1/Add.19, para 11.

the extent of damage inflicted or the consequences of the breach are irrelevant to the employers' right to dismiss.⁶⁰

ILO quasi-jurisprudence regards excessive sanctioning of illegitimate strike action as a breach of the principle of freedom of association and a threat to the capacity to carry out legitimate strike action. The lack of proportionality in the sanctions for illegitimate strike action in Australia creates a compliance impasse which can only be resolved by the adoption of wholesale reforms.

Unprotected Strike Action by Workers in Essential Services

ILO standards provide that it will be permissible to restrict otherwise legitimate strike action where it could impede the functioning of an essential service or where strike action by employees is incompatible with the function of their particular office. A restriction of this type may only occur in exceptional circumstances and may not be based on the economic impact of strike action. Categories identified by ILO bodies in which it is permissible to restrict the right to strike are:

- public servants exercising authority in the name of the State;
- acute national emergency; or
- essential services - those services the interruption of which would endanger the life, personal safety or health of the whole or a part of the population.

Under the WRA, where workers in essential services are concerned, strike action may attract additional penalties due to the nature of the work that they perform. Where essential service employees are engaged in protected action, the AIRC may terminate a bargaining period, leaving any resultant action open to potential liability.⁶¹ This will be discussed further below.⁶² In addition, where essential service employees are engaged in unprotected action there are provisions that may affect them in addition to other potential liabilities affecting unprotected action: deregistration of an organization and the *Crimes Act* 1914 (Cth). The issue with respect to compliance is whether or not these provisions apply to workers in essential services in the strict definition of the term.

⁶⁰ See chapter 6 at 159-163.

⁶¹ See chapter 6 at 186-188.

⁶² See below at 279.

Deregistration of an Organization

An organization registered in the federal system may be deregistered by the AIRC on the grounds that the organization or its members have engaged in strike action interfering with trade or commerce or the provision of any public service.⁶³

Deregistration of an organization prevents that organization participating in the federal workplace relations system and from engaging in protected action. This means that the organization is denied the right to strike. The grounds for deregistration do not constitute grounds which would justify the restriction of the right to strike under ILO standards as neither trade and commerce generally, nor the provision of a public service, are essential in the strict sense of the term. This point has been made by the CEACR, which considers that the effect of deregistration provisions is to prohibit strikes in such circumstances.⁶⁴ This provision exceeds restrictions on strikes in essential services permissible under the principle of freedom of association and, despite the fact deregistration is not commonly used in practice, it is non-compliant.

Commonwealth Crimes Legislation

The *Crimes Act 1914* (Cth) is independent of the WRA and is applicable to all strike action although the impact of the Act on protected action is unclear.⁶⁵ Sections 30J and 30K operate to enable general prohibitions of strikes or lock-outs and may criminalise conduct threatening trade or commerce between Australia and other countries or between States, or interference with the Commonwealth public service or the transport industry. These provisions are incompatible with ILO standards that only permit a general prohibition in times of acute national emergency. Further, the possible restrictions under ss 30J and 30K are well in excess of the strict ILO definition of essential services. The inclusion of the provisions in criminal legislation is contrary to ILO standards concerning acceptable sanctions for illegitimate strike action.

⁶³ WRA s 294. See discussion in chapter 6 at 205-207.

⁶⁴ CEACR *Individual Observation Australia*, Convention 87, 2001: "registration of an organization may be cancelled where it or its members engaged in industrial action interfering with trade or commerce or the provision of any public service (s 294), which for practical purposes prohibits strike action in such circumstances".

⁶⁵ See chapter 6 at 223-224.

The provisions are redundant in practice. However, CEACR Observations have repeatedly recommended the repeal of the provisions as they are incompatible with the principle of freedom of association and remain a threat to the right to strike.⁶⁶

Payment for Periods of Strike Action

Under ILO standards on the principle of freedom of association it is permissible to deduct wages from employees for periods of strike action, provided that such deductions are commensurate with the period that was not worked. However, parties should be free to negotiate over the issue of payment for strike action in the terms of a collectively negotiated agreement.

Part VIIIA of the WRA expressly outlaws any payment of remuneration for a period of industrial action.⁶⁷ Whether or not employees can be paid for partial stoppages remains unclear. The Coalition Government has sought to ensure that no remuneration is paid to an employee for **any day** on which strike action occurred **in any form**.

The ILO is critical of these provisions arguing that they excessively limit the subject matter of strike action. The CEACR acknowledges that it is permissible to deduct wages where strike action occurs, but it is contrary to the principle of freedom of association to prevent workers negotiating with an employer over the question of strike pay.⁶⁸

The Federal Government argues that it is not inconsistent with the principle of freedom of association for an employer to refuse to pay wages to an employee in connection with a strike.⁶⁹ Further it states that Part VIII is a reflection of the common law rule that denies remuneration to workers who do not perform the work required

⁶⁶ See above at footnote 6.

⁶⁷ For discussion of Part VII see chapter 6 at 195-196.

⁶⁸ CEACR *Individual Observations Australia*, Convention 87, 2003 and 2004: "Noting with regret that the Government reiterates that it is not contemplating any legislative reform to bring its legislation into conformity with the Convention ... the Committee recalls that: Providing in legislation that workers cannot take strike action in support of a claim for strike pay is not compatible with the principles of freedom of association".

⁶⁹ In the 2003 and 2004 *Individual Observations on Convention 87*, the CEACR repeated the view of the Federal Government that "the prohibition in the legislation is compatible with freedom of association principles and merely reflects the common law rule that denies remuneration to workers who don't perform the work required by their contract of employment, as confirmed by national courts". CEACR *Individual Observations Australia*, Convention 87, 2003 and 2004.

by their contract of employment.⁷⁰ However, these arguments fail to address the substance of the CEACR critique. The CEACR considers that, in accordance with the principle of freedom of association, employers and employees should be free to choose the subject matter in contest during collective bargaining, including the right to be paid for periods of strike action. This would not make it mandatory for employers to pay remuneration for periods of strike action. The reference to the common law doctrine of no work, no pay is also fallacious. It suggests that a provision breaching the principle of freedom of association is legitimate because it is based upon a common law doctrine that breaches the principle of freedom of association. In any event, the common law doctrine does **not** prevent parties renegotiating contractual terms after the cessation of strike action that include a provision providing for payment for periods relating to strike action.⁷¹ The WRA goes further than the common law, not merely permitting employers to withhold remuneration, but mandating non-payment and making it unlawful to negotiate the matter in subsequent bargaining rounds.

The Federal Governments proposal to ensure that no payment is made to employees for **any day** on which **any act** of strike action occurs, would compound existing non-compliance. This would introduce a penalty for industrial action where the loss of income related to the industrial action could be higher than the man-hours lost to the employer (for example - where one day's wage is lost for a half-day or hour long strike). This would penalise the employee, encourage parties to avoid short, temporary or partial work bans in favour of daylong total stoppages, and provide a potential profit to the employer in terms of unpaid man-hours. This scenario is not designed to facilitate voluntary collective bargaining but to interfere with the bargaining process and further restrict the degree to which bargaining represents the voluntary actions of the parties involved.

Protection Against Anti Union Discrimination for Engaging in Strike Action

ILO standards on the principle of freedom of association dictate that workers should be protected against discrimination on the basis of their involvement with a trade

⁷⁰ Ibid.

⁷¹ Provided the subsequent contract is supported by consideration it will be considered legal and binding.

union, extending to participation in strike action. ILO quasi-jurisprudence states that it is important to implement legislative machinery to deal with potential and actual discrimination, including the provision of adequate and appropriate compensation. However, damages should not be the only remedy as this may allow employers to take the calculated risk of discriminating and paying damages to achieve a desired discriminatory outcome. Compensatory mechanisms should encompass reinstatement, back payment of wages and maintenance of accrued rights.

Under the WRA, protection for employees against anti union discrimination is provided in Part XA, dealing with freedom of association.⁷² These provisions prevent discrimination or victimisation against employees on the grounds of their involvement in trade union activities. The legislative scheme of Part XA is comprehensive and generally compliant with ILO standards by protecting a limited non-functional construction of the principle of freedom of association. The reverse onus of proof, requiring employers to rebut the presumption that they have acted in breach of the provisions where the employee makes out a prima facie factual circumstance, is highly protective of workers in a scenario where “the real reason for [the conduct may be] impossible, or nearly impossible, of demonstration through ordinary forensic processes”.⁷³ The remedies available for a breach of the freedom of association provisions are in accordance with ILO standards, encompassing the imposition of penalties, the payment of compensation or reinstatement.⁷⁴

The main shortcoming of Part XA is that it does not protect employees against discrimination or victimisation for participation in all forms of legitimate strike action. The provisions encompass a broad range of potentially discriminatory conduct. However, they do not expressly protect against discrimination or victimisation on the grounds that a party has engaged in legitimate but unprotected strike action. On the basis of the express legal framework, there is no interplay between Part XA and the right to strike. This expression of freedom of association sits uncomfortably with ILO standards that do not separate the right to strike and the principle of freedom of association, requiring protection to apply to all legitimate activities of trade unions.

⁷² See chapter 6 at 207-214.

⁷³ Per Smithers and Evatt JJ in *Bowling v General Motors-Holden Pty Ltd* (1975) 8 ALR 197 at 204.

⁷⁴ WRA s 298U.

Amelioration of this position and a degree of protection against discrimination or victimisation relating to legitimate unprotected industrial action may be found in judicial interpretations of Part XA. As discussed in chapter 6, members of the judiciary have been increasingly willing to construe Part XA in the context of the WRA as a whole.⁷⁵ Recent case law has demonstrated that the protections available in Part XA may extend to legitimate unprotected industrial action. In both *Davids Distribution*⁷⁶ and the *Finance Sector Union Case*,⁷⁷ the Federal Court recognised that Part XA interacts with other Parts of the WRA in order to protect the activities of industrial organizations, in accordance with the broader objectives of the Act. However, whether or not the approach of the court in these cases will lead to broader protection for legitimate unprotected action, especially in the light of the High Court decision in *Electrolux* which applied a strict literalist interpretation to the protected action provisions, remains to be seen.⁷⁸ The suggestion, however, is that a whole-of-Act approach, enabling the freedom of association provisions to be applied to legitimate unprotected action, would create a greater degree of compliance with ILO standards.

Dimension Two – The Operation of Protected Action

The preceding section examined the distinction between action that is protected and action that is not protected in order to measure the range of action considered legitimate under ILO standards but unprotected by the federal model. A number of deficiencies in the federal model have been noted. The discussion will now examine the pre-requisites and procedural requirements for undertaking protected action. The analysis will measure the protected action process against ILO standards in order to examine whether the provision of the right to strike in the federal model excessively hampers or limits the taking of action that is protected.

⁷⁵ See chapter 6 at 210-213.

⁷⁶ *Davids Distribution*, supra note 25.

⁷⁷ *Finance Sector Union of Australia v Australia and New Zealand Banking Group Ltd* (2002) 114 IR 352.

⁷⁸ *Electrolux*, supra note 33.

Prerequisites to Taking Protected Industrial Action

The ILO model of voluntary collective bargaining supported by the right to strike requires that the model of bargaining in operation should not hinder the exercise of the right to strike or render it nugatory in practice. Accordingly, the ILO model is capable of supporting pre-requisites to strike action. However, such pre-requisites must serve an independent purpose and not exist merely as an obstacle to the exercise of the right.

Negotiation, Conciliation and Arbitration

ILO standards accommodate the imposition of prerequisites of negotiation or conciliation to assist in avoiding strike action. Arbitration will only be encompassed by the principle of freedom of association if parties voluntarily submit, or where it is used to break a prolonged deadlock. Where the latter option is available, the deadlock provision must be tightly monitored to ensure that parties do not push for an arbitrated outcome by prolonging strike action. The overriding consideration is that a negotiated outcome will be preferable to an imposed solution.

Negotiation and Conciliation

The protected action regime requires that parties genuinely try to reach agreement with each other before undertaking protected industrial action.⁷⁹ If the AIRC considers that a party has not genuinely tried to reach agreement then the industrial action may lose protected status. This requirement is in accordance with ILO standards and is consistent with the goal of encouraging genuine bargaining.

Arbitration

Under the WRA bargaining model, there is no conciliation or arbitration prerequisite to undertaking protected strike action. However, non-voluntary binding arbitration may be imposed when a bargaining period is terminated by the AIRC, resulting in the production of a s 170MX award.⁸⁰ Arbitration in this context does not operate as a pre-requisite to strike action, but provides for the resolution of disputes threatening

⁷⁹ WRA s 170MP. Section 170MOP requires that a party must comply with any order made by the AIRC in connection with the negotiations before undertaking action. See discussion in chapter 6 at 186.

public safety or economic stability. The provisions encourage negotiation, and the arbitrated outcome may only apply to matters left unresolved in the dispute.⁸¹

The availability of s 170MX orders after the termination of a bargaining period in the context of protracted disputes could encourage parties to manipulate the availability of protected action in order to seek an arbitrated outcome. Section 170MX awards are not limited to 20 allowable award matters,⁸² providing an incentive to manipulate strike action to achieve a legally binding award beyond the minimum safety net.⁸³

Manipulation of strike action in this manner is inconsistent with ILO standards.

However, in practice the AIRC can prevent such abuse. For example, in *Coal and Allied Operations Pty Ltd v Construction Forestry Mining and Energy Union (CFMEU)*,⁸⁴ the CFMEU sought AIRC orders terminating a bargaining period on the basis of their own industrial action that they claimed was threatening to endanger the life, personal safety and health of the people of Newcastle and the Hunter Regions.⁸⁵ Termination of the bargaining period would enable the AIRC to make an award under s 170MX. On appeal the Full Bench of the AIRC refused to terminate the bargaining period noting the consequences of terminating a bargaining period given the “competing rights of registered organizations and employers to take industrial action” involved.⁸⁶ While the legal framework and availability of s 170MX awards may provide an avenue for parties to abuse the availability of binding arbitration, on the practical level AIRC interpretation and approach to s 170MX awards provides compliance with ILO standards.

A further issue is the role of compulsory arbitration in the federal system through the award safety net.⁸⁷ The safety net is maintained through the traditional mechanism of conciliation and arbitration where an organization creates an ‘industrial dispute’ by

⁸⁰ See discussion of the creation of s 170MX awards in chapter 6 at 189.

⁸¹ WRA s 170MX(3).

⁸² WRA s 170MY(2).

⁸³ Under WRA s 89A an AIRC award made in resolution of an industrial dispute is limited to 20 allowable award matters. For discussion of the award safety net see: chapter 6 at 173-174.

⁸⁴ *Coal and Allied Operations Pty Ltd v Construction, Forestry, Mining and Energy Union* (1998) 80 IR 14.

⁸⁵ Ibid.

⁸⁶ Ibid per Munro J at 52.

⁸⁷ For discussion of the award safety net see chapter 6 at 173-174.

serving a 'log of claims' on an employer.⁸⁸ The process results in an arbitrated award, compulsorily imposed upon the employer concerned. This issue is not relevant to this discussion of strike regulation but it raises interesting and difficult questions around the nature of the federal labour relations model as a hybrid system, the compatibility of the Australian approach with the principle of freedom of association, and the use of binding arbitration to establish minimum employment terms and conditions.

Strike Ballots

ILO standards provide that a ballot of affected employees prior to undertaking strike action is an acceptable pre-requisite to strike action provided that the ballot method, quorum and majority vote required do not make the exercise of the right to strike very difficult or impossible in practice.

Under the WRA protected action model there is no compulsory strike ballot before parties initiate a bargaining period and undertake protected action.⁸⁹ Where a strike involves a workers' organization, it is required to comply with its own internal constitutional requirements which may involve the imposition of a strike ballot.⁹⁰ A strike ballot may be externally imposed where the AIRC is of the opinion that the prevention or settlement of the dispute would be furthered through a simple majority ballot.⁹¹ These provisions are in compliance with ILO standards:

The Federal Government has sought unsuccessfully to introduce legislation imposing compulsory strike ballots for all protected action.⁹² This proposed amendment would not be contrary to ILO standards provided that the ballot regime does not hinder the exercise of the right to strike, is carried out efficiently and effectively, and the proposed ballots do not require an absolute majority.⁹³

⁸⁸ For discussion of the process of award making under conciliation and arbitration see Creighton and Stewart, *supra* note 30 at 123-148.

⁸⁹ See chapter 6 at 184-185.

⁹⁰ WRA s 170MR.

⁹¹ WRA s 135.

⁹² *Workplace Relations Legislation Amendment (More Jobs, Better Pay) Bill 1999* (Cth), the *Workplace Relations Legislation Amendment (Secret Ballots for Protected Action) Bill 2000* (Cth) and the two *Workplace Relations (Secret Ballots for Protected Action) Bills 2002* (Cth).

⁹³ As noted in chapter 3, the CFA has consistently concluded that requirements for absolute majorities excessively hinder the right to strike: *Complaints presented by the International Confederation of Free Trade Unions, the Federation of Peruvian Light and Power Workers and Various other Trade Union Organizations against the Government of Peru*, Document Vol. LXV, 1982, Series B, No. 1, Report

The majority of the proposed secret ballot regime is in accordance with ILO standards. However, the ballot process proposed by the Federal Government would be supervised and administered by the AIRC, introducing an additional level of complexity. This goes beyond the simple imposition of a secret ballot requirement, instituting an onerous supervisory structure. A discussion paper released with the latest version of the Bill states that the “main role of amendments will be to act as an influence for unions in particular to reassess their industrial action options, allowing a shift in negotiating power to employers”.⁹⁴ The paper suggests that the supervision process proposed is designed to ‘influence’ unions to ‘reassess’ their options concerning industrial action, suggesting that the proposed amendments go beyond ensuring that appropriate consent is obtained before industrial action is undertaken. The supervision would act as a barrier to undertaking industrial action, making the exercise of the right to strike more difficult in practice. This would reduce compliance with respect to international standards if passed into law.

Notice Requirements

ILO standards encompass notice requirements as a pre-requisite to the undertaking of legitimate strike action provided that notice requirements facilitate negotiation and do not act as mandated time restrictions on strike action.

Under the federal WRA bargaining model, parties must give 7 days’ notice of their intention to initiate a bargaining period and 3 days’ notice of their intention to commence protected industrial action, unless they are acting in response to industrial action by the other party.⁹⁵ In practice this means that a strike may be undertaken with a minimum of 7 days’ notice, if the strike notice is given to the other party during the original term of notice to initiate a bargaining period. This process does not constitute an undue obstacle to undertaking protected action. It provides time for parties to

214, Case 1081, para 266. However, these complaints have largely been in the context of industry wide bargaining or large trade unions and it remains unclear if a requirement of an absolute majority in a dispute involving an enterprise based trade union would be unduly restrictive given that there are significantly fewer obstacles to achieving an absolute majority. See discussion in chapter 3 at 105-106.

⁹⁴ *Workplace Relations Amendment (Secret Ballots for Protected Action) Bill 2002* [No 1], Bills Digest No. 116 2001 – 02, Prepared by Steve O’Neill, Economics, Commerce and Industrial Relations Group, Published by the Department of the Parliamentary Library, 2002 at 20.

⁹⁵ See discussion of notice requirements in chapter 6 at 183-184.

negotiate in order to avoid strike action. The possibility of parties simply waiting for the period of notice to expire before undertaking strike action is countered by the ability of the AIRC to suspend or terminate a bargaining period where it considers that a party to protected industrial action has not genuinely tried to reach agreement.⁹⁶

Responsibility for Declaring that Prerequisites Have Not Been Met

ILO standards require that responsibility for declaring that prerequisites to legitimate strike action have not been met should always lie with an independent impartial body, preferably judicial, not administrative and never the employer. Under the federal system, responsibility for the administration of the WRA, bargaining periods and protected industrial action lies with the AIRC and the Federal Court which are both impartial third parties. Accordingly, the WRA is compliant in this respect.

The Course of the Strike

In accordance with normative voluntary collective bargaining principles, ILO standards require legitimate strike action to be allowed to run its natural course without interference. The ability of workers to organise and pursue their occupational interests through strike action will be threatened where interference is permitted (unless interference relates to essential services). This discussion will examine areas of the federal WRA model where interference in the course of protected action may occur. Interference may be the result of actions by the authorities (AIRC, Federal Court or the relevant Minister) or action by the parties themselves.

Action by Authorities

Action on the part of authorities may take the form of AIRC orders suspending or terminating a bargaining period or AIRC/Federal Court orders under s 127.

Suspension or Termination of a Bargaining Period

A bargaining period may be suspended or terminated where the AIRC considers that the parties have not engaged in bargaining in accordance with the norms of the system by not complying with AIRC orders or not genuinely trying to reach agreement

⁹⁶ WRA s 170MW(2)(a) and (b); See discussion in chapter 6 at page 186.

throughout the bargaining process.⁹⁷ If a bargaining period is suspended or terminated, any strike action undertaken during the suspension or termination will be unprotected. In addition the AIRC may order that no new bargaining period be initiated if it considers this to be in the public interest.⁹⁸

The suspension or termination of a bargaining period on the ground that the parties are not genuinely trying to reach agreement is compatible with ILO standards. Parties should not be able to exercise the right to strike without first exploring avenues to reach agreement. The ability of the AIRC to stop the initiation of a new bargaining period prevents parties from abusing the protected action system, provided that the power is used appropriately.

Section 127 Orders

Section 127 orders may be issued by the AIRC to stop impending, probable or actual industrial action.⁹⁹ The AIRC in *Coal and Allied* held that a s 127 order could be made against protected industrial action, but s 170MT(1) will exempt protected action from the operation of an order made under s 127.¹⁰⁰ This is compatible with ILO standards, as s 127 orders cannot interfere in otherwise legitimate, lawful and protected industrial action.

Action by the Participants in Strike Action

ILO standards do not endorse actions that are contrary to domestic law, as the act of combination cannot lend lawfulness to otherwise unlawful acts. Just as otherwise lawful actions carried out in combination should be protected, combination itself cannot protect individual members from liability under the general law. However, this does raise an issue concerning groups and group responsibility where all strike participants lose protected status due to the actions of a minority of participants.

Under the WRA protected industrial action will lose protected status if the action involves breaches of the ordinary civil or criminal law, including where action could

⁹⁷ WRA s 170MW(2) and see discussion in chapter 6 at 185-189.

⁹⁸ WRA ss 170MW(9A) and (10).

⁹⁹ WRA s 127. See discussion of s 127 in chapter 6 at 197-202.

¹⁰⁰ *Coal and Allied*, supra note 54 and see discussion of the case in chapter 6 at 198-200.

cause physical injury, wilful or reckless destruction of property or defamation.¹⁰¹ In consequence the actions of those strike participants that contravene the criminal or civil law expose all other strike participants to liability under the common law or the WRA. This involves the de facto imposition of collective responsibility for the unlawful actions of individuals. Where a person commits an unlawful action, they can be held legally responsible for those actions. Under the WRA, where unlawful behaviour takes place in the context of protected action, in addition to liability for any unlawful behaviour, the other participants in the strike action are also penalised by being left open to potential sanctions and common law liability for engaging in strike action. This penalisation of strike action is contrary to ILO standards that encompass the proportionate sanctioning of illegitimate strike action but not the sanctioning of legitimate strike action, where a penalty is already available for unlawful behaviour.

This area of the WRA must be reconsidered in order to avoid non-compliance. The collective should not be denied protection for the actions of individuals where those actions are otherwise unlawful and subject to civil or criminal causes of action. A better approach would be to remove the shield of protection for civil or criminal liability for otherwise unlawful actions, but continue to protect the industrial action itself. This would enable participants in strike action to pursue their right to strike without fear of potential collective liability arising through the unlawful actions of individuals.

Action by Employers

CFA determinations provide that the hiring of workers to break a strike in a non-essential service will constitute a “serious violation of freedom of association”.¹⁰² It will not be in violation of the principle of freedom of association to utilise existing labour or replacement workers if this does not threaten the rights of the strike participants to collectively bargain.

¹⁰¹ WRA s 170MT and see chapter 6 at 175-176.

¹⁰² *Complaint presented by the Local Federation of Trade Unions of Casablanca (Moroccan Federation of Labour against the Government of Morocco)*, Document Vol. LXVIII, 1985, Series B, No. 3, Report 241, Case 1282, para 419.

Assessing compliance in this area is difficult. In the context of the legal framework, there is no ban in the WRA on hiring replacement workers and no attempt made to qualify when such action would or would not interfere with the right of workers to strike. However, for practical purposes, the employers' ability to hire replacement labour is limited by WRA provisions that prevent an employer dismissing an employee on the basis of their involvement in protected strike action.¹⁰³ However, this would not prevent an employer from engaging casual labour on a short term basis during the course of the strike. In consequence, it would appear that the WRA model is non-compliant to the extent that there are no legal restrictions on the ability of an employer to hire temporary workers to replace those workers on strike. However, it is unclear how it would be possible to regulate a voluntary collective bargaining system to prevent employers' engaging temporary workers and ensure that such labour, if hired, is not used to undermine the right of the relevant workers to strike, and continue to maintain the **voluntary** nature of the bargaining process.

Errors of substance or process

The 2004 High Court decision in *Electrolux* highlighted the consequences of failing to meet a procedural or substantive requirement of the protected action regime.¹⁰⁴ The Australian Workers Union (AWU) had been involved in lengthy and protracted litigation over the inclusion of a union bargaining fee payable by non-union members within their list of claims for a certified agreement. At the time that bargaining commenced, it was unclear whether the claim would relate to the relationship of an employer and employee, whether it was necessary for certification that all clauses in an agreement pertain to the relationship between employer and employees, or whether protected industrial action could be undertaken in support of uncertifiable claims. After contradictory lower court decisions,¹⁰⁵ the High Court held that this was not a matter pertaining to the relationship between employer and employee, that an agreement containing such a clause could not be certified and any industrial action

¹⁰³ WRA s 1790MU. For discussion see chapter 6 at 175-176.

¹⁰⁴ *Electrolux* supra note 33. For more extensive discussion of *Electrolux* and the requirements for certification of an agreement see chapter 6 at 175-179.

¹⁰⁵ *Electrolux Products v Australian Workers Union* [2001] FCA 1600, unreported judgment, 14 November, 2001 per Merkel J; *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and Ors v Electrolux Home Products Pty Ltd and Ors* [2002] FCAFC 199, 118 FCR 177.

undertaken in support of such an agreement was not protected.¹⁰⁶ In the course of the judgment the High Court noted that in this context it is irrelevant if a party has a “reasonable belief” that their action is protected.¹⁰⁷

Electrolux involved an error of substance by the AWU resulting from an incorrect interpretation of the legislative requirements. However, the courts have been equally strict with procedural failings. An example is *National Workforce Pty Ltd v Australian Manufacturing Workers Union*,¹⁰⁸ where the Australian Manufacturing Workers Union (AMWU) correctly followed all procedural requirements for protected industrial action but lost protection because they acted in concert with two unions who were unprotected parties due to errors that they made in the protected action procedure. All three unions lost protection regardless of their clearly expressed intention to comply with the substance and process of the law, and in the case of the AMWU, their belief that the other two unions were protected parties. The outcomes of these cases demonstrate that the courts are unwilling to consider either procedural errors, or difficulties in the application of a complex legal structure, as mitigating circumstances in a failure to comply with the protected action regime.

A further problem highlighted in *Electrolux* is the potential for parties to breach the coercion provisions. Section 170NC of the WRA creates the civil offence of coercion where a party takes or threatens to take any industrial action with intent to coerce another party into entering a Division 2 or 3 certified agreement, unless they are engaged in protected action.¹⁰⁹ The aim of undertaking protected industrial action is to obtain a certified agreement on acceptable terms. If parties attempt to undertake protected action, but are unsuccessful due to a substantive or procedural defect, then their intention to enter a certified agreement will operate as intention to coerce for the purposes of s 170NC. The six member majority in *Electrolux* held that in consequence of the loss of protection, the AWU action breached the coercion provision.¹¹⁰ The decision suggests that a breach of s 170NC will be an automatic consequence of failing to comply with the protected action provisions. This prompted Kirby J in his

¹⁰⁶ *Electrolux*, supra note 33.

¹⁰⁷ Ibid at para 120 per McHugh J.

¹⁰⁸ [1998] 3 VR 265. See the discussion of this case in chapter 5 at 144-146.

¹⁰⁹ See chapter 6 at 192-193.

dissenting judgment in *Electrolux* to warn that the approach adopted by the majority introduces a “serious chilling effect into ... negotiations” for a certified agreement.¹¹¹ The intention to conform to the legal requirements, an error of process or a pre-existing confusion in the law will not excuse a failure to comply with the letter of the law and may expose organizations to an automatic finding of coercion.

The approach of the court in *Electrolux* is entirely at odds with a system of collective bargaining based on ILO standards concerning the principle of freedom of association. A voluntary system of free collective bargaining cannot work to the full advantage of all parties when it is restricted by excessive legalism, overburdened with complex regulation, and when parties may inadvertently fall foul of the substantive and procedural requirements resulting in a retrospective loss of protection.¹¹² Bargaining is not an exact science, but the approach of the High Court is to require exact compliance with law and process despite the immense complexities inherent in industrial relations. The fear of retrospective loss of protection and exposure to liability will inevitably inhibit workers in exercising their right to undertake protected action.

Strikes Undertaken by Workers in Essential Services

ILO standards encompass the restriction of otherwise legitimate strike action where it could impede the functioning of an essential service or where strike is incompatible with the function of a particular office.

The WRA protected action provisions do not distinguish between essential and non-essential services. All participants in the federal regime may undertake protected action without discrimination on the basis of occupation. The restriction of strike action in the context of essential services occurs through provisions enabling the AIRC to suspend or terminate a bargaining period where the protected industrial

¹¹⁰ *Electrolux*, supra note 33.

¹¹¹ Ibid per Kirby J at para 192.

¹¹² The Full Court of the Federal Court in the *Electrolux* decision stated: “Fundamental to Part VIB of the Act [the collective bargaining regime] is the notion that, within strict and objectively definable limits, organizations, employees and employers are entitled to engage in industrial warfare ... If that purpose is to be achieved, a high degree of certainty is essential. If parties are to make rational and confidential decisions about their course of conduct, they need to know where they stand”. *Electrolux*, 2001, supra note 105 at para 92-93.

action threatens essential services.¹¹³ The ILO construction favours the declaration of certain services as essential, whereas the federal model allows strikes in all services, until such time as the strike constitutes a threat to public safety. The federal approach has merit. Rather than seeking to designate certain industries as essential, the Australian system allows for strikes in all services, only placing limitations on strikes where they become problematic from an essential service perspective. This is a practical and flexible approach to the regulation of essential services. However, the issue from the compliance perspective is whether the provisions exceed permissible restrictions on the right to strike in essential services within the strict ILO definition of the term.

Under the protected action regime a bargaining period may be suspended or terminated by the AIRC where protected industrial action is threatening to endanger the life, personal safety or health of the population, or part of the population, or where it threatens to cause significant damage to the Australian economy, or a significant part of it.¹¹⁴

Public Safety

The ability of the AIRC to suspend or terminate a bargaining period in circumstances where life, personal safety or the health of the population, or part of the population, is endangered is compatible with restrictions on the right to strike allowed by ILO standards. The only difficulty with the federal approach is to the potential for expansive interpretation of the concept of risk to life, health and personal safety. However, AIRC decisions demonstrate that it the AIRC is mindful of the tension between allowing the free operation of market forces and the protection of public safety that is inherent in an application under these provisions.¹¹⁵ Provided that AIRC interpretation of the section continues to be restrictive rather than expansive, the application of the provision in practice will remain compliant.

¹¹³ See discussion in chapter 6 at 185-189.

¹¹⁴ WRA s 170MW(3). See discussion in chapter 6 at 186-188.

¹¹⁵ See *Coal and Allied Operations v CFMEU*, supra note 84, where Munro J stated at 51-52: "Section 170MW(3) is a most important part of the section [170MW]. The way in which it is interpreted and applied has serious consequences for disputing parties and for the public at large. Its operation involves the resolution of the competing rights of registered organizations and employers to take industrial action against each other with impunity and of the community and the economy to be protected from serious harm arising from such action."

Economic Loss

The ability of the AIRC to suspend or terminate a bargaining period which is threatening to cause significant damage to the Australian economy or an important part of it, is not compatible with permissible essential services restrictions on the right to strike in ILO standards. Economic damage is not relevant to designation of essential services under ILO standards unless the damage constitutes a threat to public safety. Despite restrictive judicial interpretation of the words “significant” and “important” in s 170MW(3),¹¹⁶ the section operates on the premise that economic damage is, of itself, sufficient to restrict the right to strike, and this is not compatible with ILO standards. The measure of a successful strike campaign is often the degree of economic damage inflicted on the employer. But, the more economically successful a strike is, the more likely it is that the AIRC may suspend or terminate the bargaining period. Conversely, where an employer exercises a successful lockout, the infliction of significant economic damage on the employees concerned will rarely constitute grounds to suspend or terminate a bargaining period, as economic damage to employees does not translate as easily to economic damage to the economy.

It must also be acknowledged that the economic damage provision serves a public interest purpose. It is conceivable that the economic impact of successful strike action could be severe enough to threaten public safety. However, this circumstance is adequately addressed through the public safety provision in s 170MW(3)(a).¹¹⁷ Where economic damage constitutes a threat to public safety, this provision will allow suspension or termination of a bargaining period without the necessity for a separate specific threat to the Australian economy.

The economic damage provision has been the subject of scrutiny by ILO bodies. The CFA considered the provision in the context of a complaint made in the aftermath of

¹¹⁶ Commenting on the application of s 170MW(3), the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585 per Gleeson CJ, Gaudron and Hayne JJ, Callinan J in agreement, at 594 stated that “the nature of the threat to which a decision-maker must be satisfied under s 170MW(3) of the Act involves a measure of subjectivity or value judgment ... The presence of the words ‘significant’ and ‘important’ ... indicate that the decision-maker must have some basis for his or her satisfaction over and above generalised predictions as to the likely consequences of the industrial action in question”. For further discussion of the decision in *Coal and Allied* see chapter 6 at 186-188.

the 1998 Australian waterfront dispute.¹¹⁸ The CFA considered the ability of the AIRC to suspend or terminate a bargaining period in the context of economic damage inflicted upon the Australian economy as a consequence of protected strike action undertaken at various ports during the waterfront dispute. The CFA concluded that the removal of protection where strike action threatens to cause significant damage to the economy is not in accordance with the obligation to provide a right to strike and “economic damage is not of itself relevant” as a basis for identifying work as an essential service.¹¹⁹ The CFA commented that “while the economic impact of industrial action and its effects on trade and commerce may be regrettable, such consequences do not, in and of themselves, render a service essential”.¹²⁰ However, it was also suggested that it would be permissible, given the importance of the maritime industry to the supply of essential goods and services in Australia, to declare the wharves a public service which would justify legislation establishing a minimum service to be maintained in times of dispute, negotiated on a tripartite basis.

The CEACR has also been critical of the economic damage provision, while acknowledging the potential negative economic effects of strike action.¹²¹ In 2003, the CEACR criticised the federal provision, but conceded that in situations where economic damage is “irreversible” or “out of proportion to the occupational interests of the parties to the dispute”, it would be preferable for the authorities to establish a system of minimum service in public utilities rather than an “outright ban” on strike action.¹²²

¹¹⁷ See discussion above at 285.

¹¹⁸ *Complaint against the Government of Australia presented by the International Confederation of Free Trade Unions (ICTFU), the International Transport Workers' Federation (ITF), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA)*, Document Vol. LXXXIII, 2000, Series B, No. 1, Report 320, Case 1963.

¹¹⁹ *Ibid*, para 229.

¹²⁰ *Ibid*, para 230.

¹²¹ CEACR *Individual Observation Australia*, Convention 87, 1999: “the denial of protection to strike action in these circumstances goes beyond the definition of essential services accepted by the CEACR and CFA, namely those services whose interruption would endanger the life, personal safety or health of the whole or a part of the population”. In the CEACR *Individual Observation Australia*, Convention 87, 2001, in response to Federal Government comments that the AIRC has a discretion in the application of the section noted that “there remains a very real possibility for workers and their organizations to be subject to sanctions for taking such strike action and industrial action threatening to cause substantial damage to the Australian economy is essentially prohibited”.

¹²² CEACR *Individual Observation Australia*, Convention 87, 2003. The CEACR reiterated its concern regarding the restriction of the right to strike in respect of economic damage but noted, in response to the complaint made to the CFA, *Complaint against the Government of Australia*, *supra* note 118, that in order to avoid damages which are irreversible or out of proportion to the occupational interests of the

Resolution of Disputes

ILO standards require the provision of speedy, adequate and impartial mechanisms to resolve disputes where workers in essential services are denied the right to strike. In the federal system this is provided through AIRC conciliation and arbitration in the event of termination of a bargaining period and may lead to the imposition of an arbitrated award.¹²³ This process is compatible with ILO standards provided that the initial restriction of strike action is appropriate.

AWA Protected Action

The provisions enabling individual employers and employees to engage in protected industrial action for the purposes of negotiating an AWA are difficult to measure for the purposes of compliance.¹²⁴ While ILO standards on the principle of freedom of association do not encompass individual strike action, they do not specifically exclude the possibility. ILO freedom of association standards have not yet developed sufficiently to deal with the challenges posed by individualism and contractualism.¹²⁵ ILO bodies are mindful of the issue but the quasi-jurisprudence has not yet developed sufficiently to enable measurement of the Australian legal regime against ILO standards.

The AWA protected action regime raises questions over whether or not providing an individual right to strike is meaningful in any practical sense for the pursuit of bargained outcomes. For the vast majority of employees, the exercise of an individual right to strike will not produce useful results. A single employee is extremely unlikely to be able to inflict any degree of damage on the business of an employer that the employer cannot counter through shifting and reallocating employment responsibilities or through the hiring of replacement casual staff. However, a single employer can inflict significant damage on an employee through the use of a lockout. An individual employee will rarely have the financial resources to forego a single full

parties to the dispute, as well as damage to third parties, the authorities could establish a system of minimum service in services which are of direct public utility rather than impose an outright ban on strikes.

¹²³ WRA s 170MX.

¹²⁴ See chapter 6 at 193-195.

pay, let alone survive a protracted dispute with their employer.¹²⁶ The AWA protected action provisions are a bastardisation of the right to strike, enabling only employers to achieve employment related outcomes. As confirmed by the High Court in *Victoria v Commonwealth*, employer lockouts are not encompassed within ILO or ICESCR standards on the right to strike.¹²⁷ For these purposes, as they are not specifically eschewed by those standards, there is nothing to measure for compliance purposes. However, to the extent that the provisions undermine freedom of association by manipulating the right to strike to encompass employer lockouts, the provisions stand as a challenge to the effective recognition of the functional principle of freedom of association encompassing the right to strike within Australian law.

Conclusion

This chapter has consolidated the material covered in the preceding chapters and has drawn together international standards on the right to strike and Australian law to measure the degree of compliance within the federal bargaining model. The analysis has uncovered significant difficulties with respect to the scope of action that is protected by the protected action regime. These findings will be summed up in the overall Conclusion to this thesis.

¹²⁵ See the discussion of the challenges posed by individualisation and contractualism in chapter 7 at 239-243.

¹²⁶ For example, see *The Australasian Meat Industry Employees Union v G and K O'Connor* (1999) 97 IR 251.

¹²⁷ *Victoria v Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at 546-547.

Conclusion

The Dimensions of Compliance: Summary of Key Compliance Findings

Chapter 8 examined the two dimensions to the Australian compliance problem. The first dimension relates to the scope of protected action, and the areas of legitimate strike action encompassed and excluded by the protected action provisions. The second dimension relates to the protected action model, and the extent to which it enables the limited provision of a right to strike to be undertaken free from legal interference.

The key compliance findings arising out of the analysis related to the first dimension of compliance, the scope of protected action are:

1. The protected action model fails to protect the full scope of legitimate strike action encompassed by the international normative principle of freedom of association. Where legitimate strike action is unprotected, the federal system is in breach of the principle of freedom of association.
2. The protected action model only protects strike action supporting claims related to a proposed certified agreement, pertaining to the relationship between employer and employees. This is significantly narrower than the range of claims that can be supported by ILO standards on the right to strike and unduly interferes with the content of a proposed certified agreement. It restricts the right to strike by removing the ability of workers and unions to utilise the right to strike in negotiations over the proposed content of an agreement.
3. The restriction of protected action to negotiations for enterprise level agreements removes the ability of parties to strike in support of their preferred level of bargaining. The passage of legislation designed to deny the ability of parties to engage in pattern bargaining will increase non-compliance.
4. The prohibition on undertaking protected action during the currency of collective agreements is compatible with the principle of freedom of association, provided that protected action is permitted for interest disputes that arise during the term of the agreement. Judgments confining the decision

in *Emwest* to its facts¹ and the widespread use of 'no extra claims' clauses threaten compliance with respect to the use of the right to strike for interest disputes.

5. The ability of the AIRC to suspend or terminate a bargaining period where protected industrial action involves boycott conduct or pertains to trade union related issues is incompatible with the principle of freedom of association.
6. The outlawing of secondary boycotts under the WRA and TPA is incompatible with the principle of freedom of association.
7. The availability of s 127 orders against unprotected strike action that is legitimate by ILO standards (for example, boycott conduct or strike action in support of multi-employer agreements) is contrary to the principle of freedom of association, although this breach of international standards is ameliorated by the existence of the AIRC discretion in exercising the power. Proposed legislation designed to reduce the discretion will remove the ameliorative effect.
8. Sanctions available under the common law and legislation in Australia against illegitimate strike action (for example, political strikes) are disproportionate to the degree of illegitimacy and threaten the right of workers to take legitimate strike action.
9. The prohibition on strike pay is in breach of the principle of freedom of association because it does not permit parties to a collective agreement to freely negotiate the subject matter of their agreement.

The key compliance findings arising out of the analysis related to the second dimension of compliance, the content of protected action, are:

10. The definition of "industrial action" under the WRA is sufficiently broad to enable industrial actors to determine the form of strike action undertaken in the context of the protected action model. However, the failure of the definition to encompass peaceful picketing could restrict the scope of the right to strike if picketing action undertaken during protected action results in a loss of protection for the entirety of the action.

¹ *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2002) 112 IR 388. See discussion in chapter 8 at 264.

11. The system of prerequisites for undertaking protected industrial action are reasonable, designed to facilitate negotiation and do not hinder the exercise of the right to strike. However, the passage of proposed compulsory secret ballot legislation requiring AIRC supervision of all ballots has the potential to make the ballot process unduly onerous in practice.
12. The regulatory approach to the protected action regime is complex and legalistic. A failure to comply in either process or substance (for example, as to the permissible subject matter of bargaining) will result in a loss of protection. This approach places a heavy burden on parties attempting to exercise the right to strike and ignores the complexities and industrial realities of collective bargaining.
13. The strong likelihood that a failure to comply with the protected action provisions in process or substance will result in a breach of the coercion provisions places a heavy burden on participants in industrial action and unduly restricts the right to strike.
14. The loss of protection for all participants where there has been a breach of the civil or criminal law by an individual strike participant potentially penalises parties for engaging in peaceful strike action and is contrary to the principle of freedom of association.
15. The ability of employers to hire new employees with the aim of breaking a strike is contrary to the principle of freedom of association. However, it is unclear what regulatory mechanism would enable the WRA to overcome this element of non-compliance.
16. The ability of the AIRC to terminate or suspend a bargaining period where public safety is threatened accords with the principle of freedom of association.
17. Provisions allowing for suspension or termination of a bargaining period where significant economic damage is inflicted on the economy, deregistration of organizations where strike action interferes with trade or commerce or the Commonwealth public service, and provisions of the *Crimes Act 1914* (Cth) go significantly beyond the ILO definition of essential services and do not comply with the principle of freedom of association.

18. The AWA protected action regime is not an enactment of the right to strike implicit in the principles of freedom of association and is not capable of measurement in this assessment of compliance.

The Right to Strike in International and Australian Law

In light of the detailed assessment of the state of compliance of the federal labour relations system with international standards on the right to strike, it is appropriate to return to the conclusions made in chapters 4 and 7 concerning the right to strike in international and Australian law. The discussion has demonstrated that Australian law does not comply with international standards on the right to strike. To the extent that the WRA provides for the right to strike in the protected action regime, the federal model complies with international standards in a limited sense. Participants in the federal system may strike free from potential liability in support of negotiations for an enterprise level, single business agreement provided that the claims made pertain only to the relationship between employers and employees. The prerequisites for taking such protected action are reasonable and do not hinder the exercise of this limited right to strike.

However it is in the broader context of the scope of protected action, where the federal system is significantly non-compliant. The system fails to provide protection for a broad array of legitimate strike action and necessitates a legalistic approach to enforcement whereby procedural or substantive errors will result in lost protection and potential liability. This broader dimension of non-compliance stems from the differing approaches of the ILO and the Federal Government with respect to the role of strikes within voluntary collective bargaining and from differing approaches to the principle of freedom of association.

A review of the five propositions made in chapter 4 concerning international law, in the Australian context and in the light of the discussion of Australian law, reveals these tensions.

Proposition One – The right to strike, as developed within the ICESCR and ILO standards are products of the era in which they were promulgated and presuppose the

continuation of the Western commitment to collective bargaining, the presence of governments that are not inherently hostile to collectivism and the continuation of the role of trade unions as social partners.

The presupposition in international standards of continued commitment to collectivism, collective bargaining and the continued social role of trade unions means that ILO standards are out of alignment with the commitment to individualism and contractualism that has dominated Australian labour relations since 1996. The changes to the model of collective bargaining in 1996 was not predicated upon a commitment to unfettered collective bargaining or the continuation of the role of trade unions as full social partners. On the contrary, the move from compulsory conciliation and arbitration to bargaining in Australia coincided with a renewed hostility to the role of trade unions and a desire to explore forms of bargaining that deviated from traditional trade union based approaches. This reflects the challenges to Australian compliance identified in chapter 7 relating to the rise of individualism and emphasis on contractualism in Australian labour relations.²

The new approach in the federal labour relations system is evident on a number of fronts. Bargaining as an integral part of the system was not enshrined as a tool of the collective operating through trade unions. Instead, its use was left open to individuals in the form of AWAs and groups of employees operating at the initiative of employers, and independent of trade unions, utilising non-union agreements. The place of strikes within the bargaining system was not designed to facilitate free collective bargaining. It was tolerated as a sweetener for the loss of compulsory conciliation and arbitration and as a tool to control the level at which bargaining takes place. Only those using collective power on a small scale, at the enterprise or individual level, have access to the right to strike without fear of legal repercussion. Broader expressions of collective power, extending beyond a single business and into traditional industry based trade union strength, continue to run the gauntlet of potential civil liability or injunctive relief.

² See chapter 7 at 239-243.

Over the past decade in the federal bargaining system in Australia there has been no sustained commitment to collective bargaining based on a free market model or the continuation of the role of trade unions as social partners. The failure of the protected action regime to adequately protect legitimate expressions of the right to strike reflects a lack of commitment to free market based collective bargaining. The inclusion of individual bargaining and the failure to promote collective bargaining reflects a degree of hostility to collectivity unanticipated by ILO standards. Finally, the denial of protection to strikes dealing with social and economic issues, sympathy matters or trade union concerns, and the inclusion of scope for non-union agreements, reflects the failing of the supposition that governments will remain committed to the role of trade unions as social partners.

Proposition Two – The right to strike as developed in international standards is facilitative, non-prescriptive and adaptable. The model supports a basic self help process in which workers seek to improve their own employment conditions.

ILO standards and Australia both utilise a model of free collective bargaining, however the ILO model supports a basic self-help process, whereas the Australian model manipulates the right to strike and the use of self-help in order to dictate bargaining outcomes.

The examination of the details of the protected action model reveals that on the whole, the prerequisites to notice and the process for protected action support a basic self-help process enabling workers to seek to improve their own employment conditions, within the limited parameters of that model. There are specific difficulties within the model relating to the degree of legalism and interference with the content of agreements; however a sustained commitment to international compliance would assist in overcoming these issues if there were not a much more significant problem. The difficulty is that the broader bargaining regime does not support a self-help process for workers to seek to improve their employment terms and conditions beyond enterprise level agreements pertaining to the relationship between employers and employees. There is no recognition in the federal bargaining model of the scope of legitimate strike action recognised by the ILO or of the necessity of a free market

model to enable parties to negotiate the level of bargaining or the content of agreements.

As discussed in chapter 7, the Australian enactment of the right to strike is open to manipulation for political or economic purposes and the model lacks internal coherence. The Australian model does not operate on the basis of a free market self-help model. The lack of internal coherence and susceptibility to manipulation combine to ensure that the right to strike serves a political/ideological agenda rather than one which operates as an implicit element of the principle of freedom of association in a self help orientated bargaining regime.

Proposition Three – The right to strike as expressed within the ILO is a functional right, operating as a facet of the principle of freedom of association supporting a labour relations system of free collective bargaining. ILO principles, while flexible and non-prescriptive, are not easily adapted to labour relations systems not based upon the voluntary collective bargaining model.

The federal system is compliant to the extent that its provisions represent a voluntary collective bargaining model wherein strike action may be undertaken in support of bargaining. However, measuring compliance is more difficult where the model ceases to be collective (through individual bargaining) or ceases to operate within the free market, confining strike action to strictly defined parameters.

A significant reason for this is the competing approaches to freedom of association evident within the federal model and the ILO regime. The right to strike in Australia operates as a distinct discrete enactment and not as a facet of the principle of freedom of association. Judicial interpretations of Part XA have assisted in ensuring that the WRA enactment of freedom of association interacts with the rest of the legislation in a more holistic manner than that envisioned by the original enactment. However, such judicial inroads cannot overcome the physical and ideological separation of freedom of association and the right to strike within the bargaining model.

Operating as an implicit element of the principle of freedom of association, international standards on the right to strike are necessarily facilitative. Strike action

facilitates bargaining and the pursuit of the purposes of association. The isolation of freedom of association in the WRA, the focus on the right not to belong and the discrete enactment of the right to strike means that the WRA enactment of the right to strike is divorced from the functional role that the right to strike plays in international standards.

Proposition Four - The model of voluntary collective bargaining supported by the right to strike is voluntary in the sense that bargaining parties are voluntary actors and legal regulation should be kept to a minimum. This model supports the private ordering of labour relations by employers and employee organizations operating largely free from State regulation.

ILO standards support a right to strike that fulfils the purpose of empowering workers in the bargaining process. The logic behind this equation is based on a minimum of State regulation providing an avenue for free market forces to determine employment terms and conditions. In this free market context, labour is able to form collectives (employee organizations), as employers may form corporate structures, and exercise the right to strike in order to influence bargaining outcomes.

In the federal regime, the application of this model is constrained in the protected action provisions. Within the context of protected action, employers and trade unions may negotiate, bargain and strike free from state interference (unless strike action proves economically destructive). However, this is not the free market model envisioned by ILO standards. The State, rather than reducing regulation and allowing the free interplay of market forces, has played an active and increasingly re-regulationist role. A true free market based bargaining regime would allow parties bargaining power, supported by strike action, to dictate the content and level at which they choose to bargain. The federal system does not operate in this manner. Employee organizations cannot bargain beyond the scope of the narrowly interpreted employer-employee relationship, cannot take strike action in support of the type of agreement they wish to enter, and the issue of remuneration for periods relating to strike action has been removed from the industrial agenda.

The federal bargaining system is not free market based, and State intervention is not kept to a minimum. The State has consistently interfered with the operation of the protected action model, resulting in less space for genuine voluntary collective bargaining supported by the right to strike. Bills to restrict the practice of pattern bargaining, increase the burden of balloting procedures and reduce the content of the subject matter of bargaining would exacerbate this problem if passed into law. Excessive legalism in approach to the regulatory regime also has a 'chilling' effect on bargaining and imposes an undue restriction on the right to strike.

The fact of non-compliance with ILO standards over the lack of choice within the protected action regime can be directly linked to the inability of the Federal Government to accept the logic of the right to strike with the concomitant potential for industrial disputation and interruption. The institution in the federal system of a free market bargaining model based on the principle of freedom of association would require the concession that employee organizations must be free to exercise market power. This concession would require the Federal Government to back away from its preferred level of agreement (single business/enterprise), from the restriction of subject matter of such agreements and allow the parties to negotiate these matters based on their relative bargaining strengths. It is the failure of the system to fully embrace the voluntary and free market aspects of the ILO model that generates ongoing compliance difficulties concerning the right to strike.

Compulsion under conciliation and arbitration has been replaced in the WRA with compulsion to bargain in a manner that suits the policy and ideological objectives of the government of the day. This 'compulsion' is maintained by the continuing existence of civil and injunctive remedies applicable to any exercise of the right to strike outside the narrow parameters of protected action.

Proposition Five – The ILO model of voluntary collective bargaining based upon the principle of freedom of association and supported by the right to strike can support the inclusion of a right not to associate in organizations but will not support the individualisation of labour relations or the exclusion of trade unions from the bargaining process.

Proposition five reflects concerns within ILO quasi-jurisprudence relating to the rise of individualistic ideals in the labour relations context across Western industrialised economies, and the erosion of the fundamental precept of collectivity.

The Australian labour relations system provides an example of the ideological tensions, although masked by the rhetoric of 'choice' in bargaining structures. The enactment of freedom of association provisions enshrining the right to choose, or not to choose, to join in association does not offend ILO standards as the freedom of association principle does not exclude such legislation. However, the inclusion of AWAs and non-union agreements, the inclusion of individual 'bargaining' and individual 'strike action' and the persistent failure of the system to promote collective bargaining are a practical manifestation of the concerns expressed by ILO bodies.

The Nature of the Australian Compliance Problem

The difficulties in compliance that the federal labour law system faces are not of a specific piece meal nature. There are no intractable compliance difficulties with respect to the specifics of the regulation of protected action. To the extent that there is a functional right to strike in the form of protected action, the model is technically compliant. The protected action regime represents a workable model of the provision of the right to strike in the context of a voluntary collective bargaining regime.

It is in the broader substantive sense of compliance that the federal model requires significant attention. The failures of compliance identified in this study cumulatively point to a failure in labour relations to acknowledge the right to strike as a tool of bargaining. This tool is designed to even the playing field in the context of a voluntary free market based system of collective bargaining. The tool is not designed to be used as an instrument of policy or as a right conceded only in the context of an extremely

limited bargaining scenario where outcomes conform to those considered appropriate by the State rather than those agreed between the parties.

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